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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1166

WILLIAM E. HUTTON; JOSEPH A. W. IGLEHART; JAMES J. LEE; WILLIAM C. MILLER; EARL K. BASSETT; JOHN M. BLEAKIE; ERNEST E. KEUSCH; BENJAMIN D. WILLIAMS; JOHN J. ANGLIM; REGINALD N. BARNARD; JUSTIN J. STEVENSON, JR.; J. LOGAN BURKE; JAMES M. HUTTON, III; THOMAS C. CAFONE; HART HAGIN; CLINTON J. COOMBS; ARTHUR T. HAMILL; JAMES M. HUTTON, III, EXECUTOR OF THE ESTATE OF DEFENDANT JAMES M. HUTTON, JR., DECEASED; ROBYN B. HALL, VERNON H. HALL, III AND DUDLEY HALL, EXECUTORS OF THE ESTATE OF DEFENDANT VERNON H. HALL, II, DECEASED; AND W. E. HUTTON & CO., A PARTNERSHIP,

Petitioners,

against

THE JOHNS HOPKINS UNIVERSITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1973

No. _____

William E. Hutton et al.,
Petitioners,

against

The Johns Hopkins University,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners ("Hutton"), Defendants-Appellants below, hereby respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered December 4, 1973, which after ten years of litigation without a trial, affirmed summary judgment of liability under § 10(b) of the Securities Exchange Act of 1934 and § 17(a) of the Securities Act of 1933 granted by the United States District Court for the District of Maryland in favor of the respondent ("Hopkins"), Plaintiff-Appellee below. At issue are important and unresolved questions of federal securities law arising from conflicting interpretations of the decisions of this Court in *Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970) and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972).

Opinions Below

There have been two appeals decided by two different panels of the Fourth Circuit. The second opinion dated December 4, 1973, Appendix A hereto, CCH Fed. Sec. L. Reptr. para. 94,302 (4th Cir. 1973), has not yet been offi-

cially reported. That opinion reviewed the decisions of the District Court attached hereto as Appendix B, 326 F.Supp. 250 (D. Md. 1971); Appendix C, 343 F.Supp. 245 (D. Md. 1972); and Appendix D, a supplementary opinion, not officially reported. The first decision of the Court of Appeals and a previous decision of the District Court involved a prior grant of summary judgment for Hopkins and are attached hereto as Appendix E, 422 F.2d 1124 (4th Cir. 1970) and Appendix F, 297 F.Supp. 1165 (D. Md. 1968).*

Jurisdiction

The judgment (Addendum I hereto) and opinion to be reviewed were entered December 4, 1973 and no application was made by any of the parties for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should not an exceptionally knowledgeable investor which, with the assistance, advice and upon the recommendation of its own experienced legal and investment counselors, purchases a highly speculative oil and gas production payment after face-to-face negotations with the seller over a period of seven months, be precluded from recovery, for alleged misstatements, under §§ 10(b) and 17(a) of the federal securities acts, where prior to the purchase: the investor had such knowledge, information and notice as would have led a reasonable investor to discover any misstatements and to refuse the purchase; had *actual* knowledge of certain important facts allegedly misstated; and had also ready access to *all* the pertinent facts.

2. Should not such investor in those circumstances be required to prove actual reliance upon the misstatements concerning estimated revenues from the production payment allegedly made by an employee of Hutton, the investment bankers against whom the action is brought; and further should not that investor be required to prove that such

* These opinions and decisions are in a separate Appendix binder submitted herewith and are referred to herein as "(App. A...)", "(App. B ...)", etc.

reliance, if existent at all, was under all the circumstances, reasonable.

3. Did not *Mills* v. *Electric Auto-Lite,* a class action on behalf of thousands of shareholders, and *Ute Citizens* v. *United States,* an action against the Government by 85 mixed blood Ute Indians, only dispense with proof of actual reliance upon certain specific omissions, and because of special circumstances which would have made such proof impracticable, unreasonable, and unjust and would have defeated the beneficent protective purposes of the federal securities laws.

4. Should not summary judgment have been entered in favor of the petitioners, Hutton, and against the respondent, Hopkins, since the Court of Appeals had on the first appeal expressly held that:

> (a) Prior to the purchase Hopkins had important information which revealed "misstatements about the identity of the estimators" [of future revenues]; and that
>
> (b) "Had Hopkins compared all the experts' reports, which it had a right to do under the terms of the production payment [prior to purchase], it could readily have discovered the untrue statements and the omissions, about which it now complains."

5. If Hutton is not entitled to summary judgment are there not genuine issues of material fact which do entitle Hutton to a jury trial concerning: the extent of Hopkins' knowledge; notice; diligence; reliance; the reasonableness of its alleged reliance; and the ultimate issue of liability.

Statutes Involved

Sections 12(2), 13, and 17(a) of the Securities Act of 1933 [15 U.S.C. 77l, 77m, 77q(a)]; Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)]; and Rule 10b-5 of the Securities and Exchange Commission [17 CFR § 240.15b-5], are set forth in Addendum II hereto.

Statement Of The Case

Nature of the case

This action involves the purchase for $1,300,000 from the Trice Production Company ("Trice"), Longview, Texas, by Hopkins on March 1, 1961, of an oil and gas production payment, of which Trice was the owner-operator. Hopkins alleged that in its purchase from Trice, Gilbert LaPiere, a former employee of Hutton, made certain misstatements concerning the estimated revenues from the oil and gas reserves in the 23 wells of the production payment. In *Count I,* Hopkins charges that these misstatements violated § 12(2) of the Securities Act of 1933 ["the 1933 Act"]; in *Counts II, III, and V,* that they violated § 10(b) of the Securities Exchange Act of 1934 ["the 1934 Act"] and § 17(a) of the 1933 Act; and in *Count IV* that they violated § 15(c)(i) of the 1934 Act. *Count VI* charges Hutton with common law fraud; and *Count VII* charges Hutton with negligence. Only Counts II, III and V are directly involved on this petition for certiorari.

Course of proceedings and disposition below

This action was commenced on November 1, 1963. Hopkins sought return of the purchase price, that is, *rescission,* under Count I, § 12(2) and *damages* under Counts II, III, and V, §§ 10(b) and 17(a). Hutton demanded a jury trial. On March 10, 1967, Hopkins moved for summary judgment under Count I for *rescission* and under Counts II, III, IV, and V for *damages.* On August 15, 1968, Judge Kaufman granted Hopkins summary judgment for rescission under Count I, § 12(2), which does not require proof of reliance, on the ground that LaPiere had violated § 12(2) by making misstatements concerning the estimated revenues from the reserves in the 23 wells. Judge Kaufman ruled only on Count I because Hopkins' counsel stated on oral argument that "Hopkins would consider itself fully satisfied" with such decision. 297 F.Supp. 1165, 1172 (1968) (App. F-1, 4).

Hutton appealed for the first time to the Court of Appeals. On February 18, 1970 the Court affirmed in part

and reversed in part, holding that the grant of summary judgment to Hopkins for $1,500,000 was precluded because there were genuine issues of material fact for trial by jury under § 13, the one year statute of limitations applicable to § 12(2). The Fourth Circuit on this first appeal held that (422 F.2d 1124, 1129, 1131; App. E-8, 11, 12):

> "*Shortly before the purchase of the production payment* [*on March 1, 1961*], Trice furnished information which disclosed that the estimates for thirteen wells came from sources other than D&M [DeGolyer & MacNaughton]. *To this extent, the information revealed LaPiere's misstatements about the identity of the estimators.*" [p. 1129]
>
> • • •
>
> "Had Hopkins compared all the experts' reports, which it had a right to do under the terms of the production payment [prior to purchase], *it could readily have discovered the untrue statements and the omissions, about which it now complains.*" [p. 1131]
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> • • •
>
> "It is sufficient for us to say that when, as here, a jury has been demanded and the facts give rise to conflicting inferences on the issue of reasonable diligence, *the question must be submitted to the jury.*" [p. 1131]*

The case was remanded for further proceedings pursuant to the Court's opinion. But on April 27, 1970, counsel for Hopkins stated that they wished to "reactivate" Hopkins' summary judgment motion under Counts II, III, and V, originally made March 10, 1967. Judge Kaufman did not, therefore, grant a trial as to Hopkins' diligence as directed by the Fourth Circuit. Nor did he require Hopkins to press its claims under all Counts at one time, as urged by Hutton's

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* Emphasis and brackets added throughout unless otherwise indicated.

counsel. Instead he administered the case in piecemeal and fragmented fashion with much delay and prejudice to Hutton. On May 11, 1970 Hutton filed an application to disqualify Judge Kaufman for prejudice. This he denied on July 7, 1970. And on July 28, 1970 the Fourth Circuit denied Hutton's request for mandamus. On October 16, 1970, Hopkins' "reactivated" motion for summary judgment was argued.

On April 12, 1971, Judge Kaufman ruled that Hopkins was entitled to partial summary judgment on the issue of Hutton's liability *under Counts II, III,* and *V,* and that Hopkins was entitled thereunder to *damages* but not to *rescission.* 326 F.Supp. 250 (D. Md. 1971), (App. B-1). On May 12, 1971, after this action had been pending for seven years, Hopkins nevertheless filed a motion for summary judgment of *rescission* under those same three counts. Then Judge Kaufman, in his opinion of March 29, 1972, reversed his own prior ruling of April 12, 1971 and granted Hopkins a full summary judgment of rescission under Counts II, III, and V. But Judge Kaufman did concede that "this Court would, if it could, turn the clock back . . . and require Hopkins to file *at one time* all summary judgment motions *under all counts.*" 343 F.Supp. 245, 250 (D. Md. 1972), (App. C-8).

From those judgments Hutton again appealed to the Fourth Circuit, which on December 4, 1973 (A-1, 11): (a) reversed the summary judgment of rescission and remanded for a jury trial on the issue of Hopkins' "exercise of due diligence" in demanding rescission; and (b) again directed the District Court to submit to the jury the issue of Hopkins' due diligence under §§ 12(2) and 13, Count I, "in accordance with our mandate on the first appeal." And the Court expressed perplexity over the fact that after the previous remand "for some reason not at all clear to us, the district court did not proceed with the jury trial on the Section 13 issue under count I." (App. A-3).

The Fourth Circuit did, however, on this second appeal affirm the District Court's summary judgment that Hutton

is *liable* to Hopkins under Counts II, III, and V, §§ 10(b) and 17(a). But in so doing the Court by a different panel disregarded its own rulings on the first appeal: (a) that Hopkins had information prior to the purchase which revealed LaPiere's "misstatements about the identity of the estimators"; and (b) that had Hopkins compared all the experts' reports which it "had a right to do", prior to the purchase, it "could readily have discovered the untrue statements and the omissions about which it now complains." 422 F.2d 1124, 1129, 1131 (App. E-8, 11). These findings go to the heart of the case, and are basic to the issue of liability.

Although the Fourth Circuit cited a leading case, *List* v. *Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965), which requires proof of actual reliance, it in fact improperly adopted a "materiality causation" standard which, in special circumstances not present in the *Hopkins* case, presumes reliance upon certain omissions of material fact. This standard was employed by this Court in the particular circumstances of the *Mills* and *Ute* cases to protect numerous uninformed plaintiffs who did not know and could not possibly have known of the specific misstatements of defendants there charged. The Fourth Circuit's unwarranted interpretation and extension of *Mills* and *Ute* is in conflict with decisions of several other Courts of Appeals. Delineation by this Court of the basic elements essential to liability under § 10(b) of the 1934 Act is imperative.

The Facts

On March 1, 1961, Hopkins, as authorized by its Finance Committee and recommended by its legal and investment advisers, purchased an oil and gas production payment for $1,300,000 from Trice, the owner-operator. And, at that time Hopkins received from Trice a letter of special financial guarantee dated February 23, 1961, an absolute condition precedent to the purchase. This guaranteed payment of interest at 6% on the principal amount, and certain other payments, during the pay-out over many years of Bankers Trust Company which had the primary position in the

production payment (See p. 9 *infra*). The letter provided in part:

> "It is understood that this entire undertaking is in consideration of your [Hopkins'] purchase of the production payment and net profit overriding royalty interests and *that you would not consummate such purchase unless the undersigned [Trice] entered into the agreements contained in this letter.*"

The Hopkins Finance Committee and its legal and investment advisers.

The members of Hopkins' Finance Committee and Hopkins' legal and investment advisers were at all times men with extensive knowledge and long experience: in banking, finance, law, business and investments. Venable, Baetjer & Howard, general counsel for Hopkins since 1890, worked closely with Hopkins in its purchase of the oil and gas production payment. Naess, the senior partner of Naess & Thomas, investment counsel to Hopkins for over 20 years, "introduced" Trice to Baker, the Treasurer of Hopkins; and Trice furnished a Trice brochure, dated September 16, 1960, to Hopkins.* Trice had offered to pay Naess, his friend since 1957 who recommended the purchase to Hopkins, a "2% finder's fee" for monies invested by clients of Naess in Trice production payments. Chief Judge Thomsen who had jurisdiction of the case for the first three years held that Naess and Naess & Thomas should be treated "as part of the Hopkins' organization."

Under the Trice proposal, Hopkins was to receive the return of $1,300,000 principal plus interest, and also

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* This brochure gave information concerning the estimated revenues to be paid from the production payment, and the Fourth Circuit held on the first appeal that LaPiere made certain "misstatements" concerning the estimates which prior to the purchase Hopkins discovered in part and could readily have discovered in their entirety. 422 F.2d at 1128, 1129, 1131; App. E-6, 7, 8, 11.

There has been no finding of fraud. Judge Kaufman refused to rule that LaPiere "was guilty of fraud in the common law sense" or that he "acted as an evil man." 297 F. Supp. at 1219, 1220 (App. F-104, 105, 107) and 326 F. Supp. at 255 (App. B-8). And the Fourth Circuit found also that "the Hutton partners were personally blameless." 422 F.2d at 1130 (App. E-9).

$1,138,000, or about 90% of the purchase price, as a "kicker"—in all, about $2,900,000. From the outset, the Finance Committee knew that the proposed purchase was a "novel" and "glamorous type" investment and highly "speculative." For Hopkins would have only a secondary position in the production payment—akin to a second mortgage. But on September 14, 1960, Naess told Baker of Hopkins that the production payment was a "secure investment and would get the money back with 6%" interest; that Trice Production Company was a "good company;" and that Trice was "honest" and "had integrity." And Hopkins knew also in *September 1960,* six months before the purchase on March 1, 1961: that Trice represented that the estimated future net revenue from the 23 wells was based upon reports to Trice by two engineering firms, D&M and Schafer Engineering Company. But Hopkins further knew that Trice had a serious "shortage of working capital," needed as owner-operator of the wells. And moreover, in October 1960, Bankers Trust Company purchased a $1,375,000 interest in the *overall* production payment which gave it a primary position in 18 of the 23 wells. This left for Hopkins a residual interest of about $1,300,000 with a secondary position in the 18 wells and a primary position in the remaining 5 wells.

On December 7, 1960 Naess advised Baker that the production payment would fit into Hopkins' investment policy, newly adopted on November 25, 1960 to permit purchase of a production payment; and that "Trice [would] pay" for Brown, whom Naess had recommended as Hopkins' independent oil and gas consultant. Baker and Naess then agreed to recommend to the Finance Committee $1,300,000 as the amount of the purchase. Both Naess and Canedy attended the January 27, 1961 Finance Committee meeting, as did Baker. LaPiere was present during only a portion of that one meeting—the only Finance Committee meeting he ever attended. Naess stated to the Committee that the Trice production payment would be a "good" and "suitable" investment for Hopkins, and that

he had selected Brown to check the production payment for Hopkins.

On February 1 and 6, 1961, Cooper, a senior member of Venable, Baetjer, legal counsel to Hopkins, and experienced in oil ventures, told Baker that Hopkins *must see the experts reports by D&M, Schafer, and Brown,* which evaluated the reserves underlying the production payment. But Baker did nothing. Cooper also discussed with Dandridge, a partner in Venable, Baetjer, the necessity for seeing the D&M and Schafer reports. But Dandridge did not obtain the reports.

The critical meeting of February 7; and the superseding Trice brochure of February 3.

On February 7, 1961, Baker, Cooper and Dandridge met with McCauley and Mitchell, officers of Trice, at the offices of Venable, Baetjer. Neither LaPiere nor anyone else from Hutton was present. Mitchell of Trice delivered to Baker, another Trice brochure of February 3, 1961. This superseded the September 16, 1960 brochure, and made it absolutely clear that the estimate as to all of the wells had not been made solely by D&M, as LaPiere had originally represented. On the contrary, the superseding brochure showed: that the estimate as to eight of the 23 wells was made solely on a *computation by Trice,* based on a loan formula allegedly used by the Mercantile National Bank in making loans to Trice; and that the estimates as to the rest of the wells had been made, some by D&M and some by Schafer. Never before had Mercantile been mentioned as having any connection whatever with the estimates of reserves.

Significantly, the Fourth Circuit expressly held on the first appeal that (422 F.2d at 1129, App. E-8):

> "Shortly before the purchase of the production payment, Trice furnished information which disclosed that the estimates for thirteen wells came from sources other than D&M. *To this extent the information revealed LaPiere's misstatements about the identity of the estimators.*"

Also at the meeting of February 7, Hopkins' counsel, Dandridge, felt it necessary to negotiate and did negotiate the special Trice financial guarantee of February 23, an overt recognition that Hopkins knew the transaction was in its nature, shaky. With respect to this guarantee, an absolute condition precedent, Baker testified that he "relied on" Dandridge. And the Fourth Circuit held (422 F.2d at 1128, App. E-5) "that Hopkins would not have purchased the production payment without Trice's guarantee. . . ." In addition Naess was to study the Brown report, check with Bankers Trust, and give Hopkins his personal opinion of the proposed purchase.

Hopkins failed to obtain critical and readily available information concerning the reserves.

Naess did speak to Bankers Trust. But he failed to ask for the figures which he could have obtained concerning the estimated reserves of the 18 wells common to the interests of Bankers Trust and Hopkins. Moreover, following the meeting of February 7, Mitchell of Trice offered to provide to Baker and Dandridge *"any information" required. But Baker dropped the matter of the "obtaining and the seeing" of the D&M and Schafer reports, which contained estimates of the reserves radically different from the estimates in the September 16 Trice brochure. Nor did Dandridge ever obtain them.* Such was their lack of diligence even though they already knew: of the misstatements concerning the identity of the estimators; and that estimates of the reserves in one-third of the wells were merely Trice's own computations based upon an alleged loan formula used by Mercantile. No one ever saw or asked to see the Mercantile engineering reports on the basis of which Mercantile allegedly made its loans to Trice. Certainly Hopkins and its advisors were flagrantly derelict in failing to make vigorous investigation of all aspects of the transaction. Small wonder that the Fourth Circuit held on the first appeal that (422 F.2d at 1131, App. E-11):

> "Had Hopkins compared all the experts' reports, which it had a right to do under the terms of the production payment [prior to purchase], *it could readily*

have discovered the untrue statements and the omissions, about which it now complains."

Naess recommends the purchase.

On February 10, 1961, Baker reported to the Finance Committee that the *estimates they had thought were by D&M were in fact made by one of D&M, Schafer or Mercantile.* On February 14, 1961 Naess wrote an opinion letter to Hopkins stating: that he had studied Brown's report; *checked on Trice at Bankers Trust and Mercantile;* that he felt Trice was completely honest; and that he and Naess & Thomas *recommended* the purchase. Baker read Naess' letter at the Finance Committee meeting of February 24, 1961 and the Committee authorized the purchase.

On March 1, 1961, Hopkins and its advisers consummated the purchase, after a seven month period of face-to-face negotiations with Trice, at a closing not attended by anyone from Hutton. And Trice delivered to Hopkins the special Trice financial guarantee of February 23. In February 1962, Hopkins learned that Trice was "in the red" and insolvent. And in October 1962, Trice went bankrupt and Hopkins now seeks to recover its alleged losses from Hutton.

The evidence establishes: that by the time of the Venable, Baetjer meeting of February 7, 1961, irrespective of anything which LaPiere may or may not have done prior to that time, Hopkins and its own legal and financial advisors had decided to "go it alone". They had decided to rely wholly, as they did thereafter: (a) upon the new and drastically different superseding Trice brochure of February 3, 1961, never seen by Hutton and for which it had no responsibility; (b) upon the Trice special financial guarantee of February 23, 1961, also never seen by Hutton, as to which the Court of Appeals expressly held: "Hopkins would not have purchased the production payment without Trice's guarantee"; and (c) upon such inexcusably meager information as Hopkins and its own advisors themselves chose to regard as satisfactory. Any alleged misstatements by LaPiere were clearly not relied upon by Hopkins and did not cause Hopkins' alleged loss.

Reasons for Granting The Writ

There is a direct conflict between the Second, Fifth, and Eighth Circuits, and the Fourth Circuit, on important questions of federal law which have not been, but should be settled by this Court. The decision of the Fourth Circuit involves a misinterpretation and an unwarranted extension of this Court's decisions in *Mills* and *Ute* to cover circumstances far different from the circumstances of those cases. Required is an exercise of this Court's power of supervision with respect to the prerequisites for liability under § 10(b) of the 1934 Act. Unless this Court clarifies the law, such litigation will continue to flourish in a state of leaderless confusion and with consequent injustice. More specifically:

1. The decision of the Fourth Circuit holds Hutton liable to Hopkins for misstatements by Hutton's employee although Hopkins prior to the purchase: had actual knowledge of some important misstatements; could readily have discovered all the misstatements charged; and could easily have acquired any other information it wished. The decision is in direct conflict with the decisions of several other Courts of Appeals. They have held in such circumstances that there is no liability under § 10(b) of the 1934 Act.

2. The Fourth Circuit's decision is also in conflict with the decisions of several other Courts of Appeals in that it dispenses with proof of reliance and applies the "materiality causation" test of the *Mills* and *Ute* cases, which in special circumstances *presumes* proof of actual reliance upon certain omissions which are material. In wholly different circumstances, the Fourth Circuit in the present case erroneously permits Hopkins to recover without proof of actual reliance or proof of any right to rely upon misstatements by Hutton's employee. Other Courts of Appeals, however, have continued to apply the general rule that a plaintiff cannot recover under § 10(b): if he did not rely upon the defendant; or if in the exercise of reasonable diligence he could readily have ascertained all the facts and should have known the facts not disclosed.

3. The extent to which the decisions of this Court in the *Mills* and *Ute* cases have modified the usual requirements of reliance is patently a basic question. That and the related question of the reasonable diligence required of a knowledgeable plaintiff are both questions of great public importance to investors and to the business community. They should be resolved by this Court.

4. The resolution of the foregoing questions is fundamental to the future conduct of the *Hopkins* case since those questions are pivotal in determining whether Hutton is, in fact, *liable* to Hopkins; and accordingly in the interests of just and efficient administration they should be finally resolved now, before any trial concerning a remedy—rescission or damages.*

ARGUMENT

I

The Court of Appeals erroneously granted summary judgment to Hopkins although Hopkins had actual knowledge of certain misstatements; could readily have discovered all misstatements; and could also readily have learned every pertinent fact.

Decisions in the Second, Fifth, and Eighth Circuits have held that § 10(b) does not permit recovery under the circumstances of the *Hopkins* case.

Hopkins, itself a highly knowledgeable investor, also had throughout the negotiations, the assistance and advice of eminent and experienced legal and investment counselors. In addition, Hopkins not only had, prior to the purchase, as the Court of Appeals found on the first appeal, actual knowledge of certain important misstatements charged by it, but ready means to discover all other misstatements and

---

* Although the Fourth Circuit's decision remanding for trial as to rescission is not a final judgment determining the entire case, this Court has on many occasions in similar circumstances granted certiorari to review important questions of law fundamental to the further conduct of the case. See, for example *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 380-381 (1970); *Perkins* v. *Standard Oil Co.* 395 U.S. 642, 644 (1969); *Land* v. *Dollar*, 330 U.S. 731, 734 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

all other pertinent information. But the new panel of the Court on the second appeal ignored those prior findings.

In striking contrast, the *Eighth Circuit* affirmed summary judgment *against* knowledgeable investors who charged misstatements of financial condition in violation of § 10(b), but who (p. 231) "had access to all the books and records" of the corporation in which they bought stock. *City National Bank of Fort Smith, Ark.* v. *Vanderboom,* 422 F.2d 221 (8th Cir. 1970), *cert. denied* 399 U.S. 905 (1970). That Court applied the principle that (422 F.2d at 230, n. 10; 231):

> ". . . Recovery would be denied to those who, because of their 'business sophistication,' acumen, or ready access to the information involved, could reasonably be expected to exercise a higher degree of care and investigation in their dealings."
>
> • • •
>
> "There is no duty to disclose information to one who reasonably should already be aware of it".

This same principle has been applied in the *Second Circuit.* In *Kohner* v. *Wechsler,* CCH Fed. Sec. L. Rptr. para. 93,537 (S.D.N.Y. 1972), the District Court barred from recovery under § 10(b), the plaintiff, an experienced businessman and investor with many financial advisers, who purchased stock (CCH p. 92,564) "after many negotiations had taken place and after the plaintiff's accountants had a full opportunity to examine the business." The District Court held that there is "no duty to disclose information to one who reasonably should already be aware of it." (CCH p. 92,565).

Affirming, the Court of Appeals for the Second Circuit stated among other things that [477 F.2d 666, 667 (2d. Cir. 1973)]:

> "Noting that '[T]he plaintiff, an experienced businessman and a sophisticated investor had many financial advisors to assist him in carefully analyzing defendant Wechsler's business before the sale was finalized,' the trial court concluded that plaintiff's mo-

> tion for a preliminary injunction should be denied and *the summons and complaint dismissed.*"

The *Fifth Circuit,* also, has ruled that there is no liability under § 10(b) to a plaintiff who knew or should have known the information not disclosed. In *Clement A. Evans & Co. Inc.* v. *McAlpine,* 434 F.2d 100 (5th Cir. 1970), *cert. denied* 399 U.S. 905 (1970) that Circuit affirmed judgment against the plaintiff stock brokerage firm which had charged defendants with misstatements in violation of § 10(b). Approving the District Court's instruction to the jury that the plaintiff was barred from recovery if it had knowledge of facts sufficient to excite its inquiry but failed to use reasonable diligence to discover the fraud, the Fifth Circuit concluded (434 F.2d at p. 104):

> ". . . [T]he plaintiff's sophistication, expertise and business acumen in the financial community, his access to information and opportunity to detect the fraud are all relevant considerations in determining the exercise of reasonable diligence."

The decision of the Fourth Circuit granting summary judgment to Hopkins is contrary to the patently sound decisions of the Second, Fifth, and Eighth Circuits.

In the *Mills* and *Ute* cases this Court did not hold that a plaintiff in Hopkins' situation could recover.

In weakly concluding in its second decision that "the accepted criteria of reliance" had been "satisfie[d]" under §§ 10(b) and 17(a), Counts II, III, and V, the Fourth Circuit erroneously followed its decision on the first appeal under Count I, § 12(2): that Hopkins could recover simply because "information about future revenues" was an essential consideration for Hopkins. App. A-4, quoting from 422 F.2d at 1130, App. E-9. But what the Court on the second appeal disregarded was: that the Court on the first appeal did not find that Hopkins had relied, since § 12(2), unlike § 10(b), does not require proof of actual reliance. Thus the Court on the second appeal held Hutton liable under § 10(b) on the same proof, of *materiality only,* previously cited by the Court on the first appeal.

The Fourth Circuit thereby adopted in error an inapplicable standard of liability, developed by this Court to apply to the wholly different facts of *Mills*. That case, cited by the Fourth Circuit on the first appeal, was a class action on behalf of thousands of shareholders charging material omissions from a proxy statement. In those circumstances, this Court held (n. 9 at p. 382), "proof of actual reliance by thousands of individuals would . . . not be feasible"; and accordingly recovery would be permitted upon proof (396 U.S. at p. 385):

> ". . . that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test *will avoid the impracticalities of determining how many votes were affected.* . . . ."

In the *Mills* case the omitted facts were that all of the Auto-Lite directors were nominees of the corporation with which they were recommending merger and were under the "control and domination" of that corporation. Obviously, the thousands of shareholders who made up the class could not have had ready access to such information and could not *reasonably* have been expected to be aware of it.

Consonant with the rationale of the *Mills* case, the District Court in *Kaplan* v. *Vornado, Inc.*, 341 F.Supp. 212 (N.D. Ill. E.D. 1972), applied a "reasonable investor" standard and affirmed summary judgment against the plaintiff, a knowledgeable businessman who charged misstatements in violation of § 10(b), concerning a debenture he had bought. For, the Court stated (p. 216):

> "In *Mills* the material fact was one which even a knowledgeable investor may not have been aware of. . . . In the case at bar, a reasonable investor would at least have made inquiries. . . . ."

In the *Ute Indian* case, 406 U.S. 128 (1972), involving very special circumstances, this Court, citing the *Mills* case, held that 85 mixed blood Ute Indians could recover under § 10(b) without "positive proof of reliance" upon specific omissions by the defendant bank employees whom the

Utes trusted. These defendants had purchased the Indians' stock, representing rights in tribal assets, without disclosing that they were re-selling the stock at a higher price. They were engaged in a palpable scheme to defraud. This Court stated (pp. 152-3):

> "The mixed-blood sellers 'considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares.' "
>
> • • •
>
> "The individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 8⅓% of the sales, but for the other sales their activities produced. *This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers.* See *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (CA 2 1970) .... The defendants may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in *the non-Indian market the defendants had developed and encouraged and with which they were fully familiar.*"
>
> • • •
>
> "*Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery.*"

Clearly these Ute Indians, inexperienced and uninformed, did not know and could not have known the omitted facts; and they did not have ready access to those facts. They could not reasonably have been expected to know that the defendants were "market makers." They needed and deserved the protection afforded by § 10(b) without positive proof of reliance on specific omissions. Similarly, in *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970), cited by this Court in the *Ute* case, the Second Circuit held that the defendant-broker, Smith, Barney, which knew that Chasins would rely on it, was liable for its failure to disclose that it was making a market in the stock it recommended to him for purchase. Obviously this also was information which the plaintiff, not a businessman

but a musical director and commentator on a program sponsored by the defendant broker, could not reasonably have found out for himself. Thus the Second Circuit held the broker liable for its (p. 1172) ". . . failure to inform the customer fully of its possible conflict of interest in that it was a market maker in the securities which it strongly recommended. . . ."

Patently the paramount purpose of this Court in the *Ute* and *Mills* cases was to give sensible effect to the beneficent protective purposes of the statutes under special circumstances where plaintiffs lack: the knowledge; the experience; the means of learning material facts; and, the ability to protect themselves where protection is necessary. Under such circumstances where it is reasonable to suppose justifiable reliance would exist, it will be presumed. But no such presumption is necessary or appropriate under the circumstances of the *Hopkins* case. Notwithstanding the sound decisions of the Second, Fifth, Eighth and other circuits, the Fourth Circuit has granted summary judgment to Hopkins. This Court should now resolve this conflict. For if Hutton's position is correct, Hutton, not Hopkins, is entitled to summary judgment.

II

There is continuing confusion among the courts concerning the circumstances in which reliance must be proved or may be dispensed with under § 10(b).

Other Courts of Appeals have followed the general rule that plaintiff must prove reliance and the reasonableness of reliance.

Hopkins is not entitled to recover from Hutton under § 10(b) because the evidence unquestionably establishes that Hopkins did not in fact rely and could not reasonably have relied upon any misstatements by Hutton's employee. The Fourth Circuit simply bypassed this critically important body of evidence. Instead the Court cited its decision on the first appeal, concerning *materiality only* under § 12(2); and applied to § 10(b) its ruling on the first appeal that Hopkins was not required to "* * * prove that the de-

fects in LaPiere's data had a decisive effect on its contract." App. A-4; 422 F.2d at 1130, App. E-9, noted also at p. 16 above. Thus erroneously, on the second appeal the Fourth Circuit used the "materiality causation" test applied by this Court to the wholly different circumstances in the *Mills* and *Ute* cases.

A number of other decisions in our Courts of Appeals have considered *Mills* and *Ute* to have relaxed the reliance requirement *only* in special circumstances such as were present in those cases. Thus the *Second Circuit* has stated in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 357 (2d Cir. 1973) *cert. denied*, 94 S. Ct. 231 (1973), that (pp. 374-375) "the *Mills-Ute* test may be appropriately invoked" in the context of a tender offer involving numerous shareholders where proof of actual reliance would be "unduly burdensome." Similarly, the *Third Circuit*, affirming summary judgment against plaintiffs, buyers of stock, on the ground among others that they had failed to prove reliance (p. 170), "an essential element of their cause of action under rule 10b-5," stated in *Landy* v. *FDIC*, 486 F.2d 139 (3d Cir. 1973), n. 36 at p. 170 that "the only exception" to the reliance requirement seems to be where it "would defeat the purposes of the rule."*

Also, in *Simon* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973), the *Fifth Circuit* affirmed dismissal of an action under § 10(b) in which the plaintiff, Simon, charged the defendant broker, Merrill Lynch, with failure to disclose material facts, holding: that plaintiff (p. 884) had "made his own investment decisions" and did not generally rely on defendant. The Court stated (p. 884):

---

* For other cases relaxing the reliance requirement where the circumstances so required, see: *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied* 90 S. Ct. 1870 (1970), citing *Mills* and holding that a plaintiff in a *class action* under § 10(b) could obtain an injunction against a tender offer without proving that the shareholders relied upon the misrepresentations alleged; and *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir. 1972), an action like *Mills* charging misstatements in a proxy statement, in which the Third Circuit stated that (458 F.2d at 269) ". . . to the extent a reliance factor is required, *in the present context* it is encompassed by the finding that the misrepresentation was material."

"Simon [plaintiff] argues that, under the *Ute* standard, he was not required to establish his individual reliance on Merrill Lynch's representations....

"We think the finding that *plaintiff did not generally rely upon the broker* for advice makes the principle asserted by Simon inapplicable here...."

The following decisions, also, strongly affirm that in an action under § 10(b), in the absence of special circumstances such as were present in the *Mills* and *Ute* cases, plaintiff must prove that he actually relied and that any such reliance was reasonable in light of his knowledge, experience, and access to the information not disclosed: *Raschio* v. *Sinclair*, 486 F.2d 1029, 1030 (9th Cir. 1973); *Financial Industrial Fund, Inc.* v. *McDonnell Douglas Corp.*, 474 F.2d 514, 523 (10th Cir. 1973), *cert. denied* 94 S. Ct. 155 (1973); *Kasner* v. *H. Hentz & Co.*, 475 F.2d 119, 121 (5th Cir. 1973), *cert. denied* 94 S. Ct. 124 (1973); *Colvin* v. *Dempsey-Tegeler & Co., Inc.*, 477 F.2d 1283, 1287-1288 (5th Cir. 1973)*

* Many district courts, as well as the circuit courts above, have continued to require proof of reliance and the reasonableness of reliance under Sec. 10(b). Thus, see *Branham* v. *Material Systems Corporation* 354 F.Supp. 1048, 1056 (S.D.Fla. 1973); *Koch Industries* v. *Vosko*, CCH Fed. Sec. L. Rptr. para. 93,705 at p. 93,133 (D. Kan. 1972); *Grad* v. *Memorex Corporation*, CCH Fed. Sec. L. Rptr. para. 94,029 at p. 94,139 (N.D. Cal. 1973); *Niedermeyer* v. *Niedermeyer*, CCH Fed. Sec. L. Rptr. para. 94,123 at p. 94,500 (D. Or. 1973); *Metro-Goldwyn-Mayer, Inc.* v. *Ross* 363 F. Supp. 23, 29 (S.D.N.Y. 1973); *Shahmoon* v. *General Development Corp.* CCH Fed. Sec. L. Rptr. para. 94,308 at p. 95,039 (S.D.N.Y. 1973).

But to the contrary, other district court decisions have dispensed with proof of actual reliance upon the defendant's alleged misstatements and approved recovery merely upon a showing of materiality: *Taylor* v. *Smith, Barney & Co.*, 358 F.Supp. 892, 895 (D. Utah 1973); *Allen Organ Co.* v. *North American Rockwell Corp.*, 363 F.Supp. 1117, 1127 (E.D. Pa. 1973); *Jenkins* v. *Fidelity Bank*, 365 F.Supp. 1391, 1398 (E.D. Pa. 1973); *Dorfman* v. *First Boston Corp.*, CCH Fed. Sec. L. Rptr. para. 94,155 at p 94,636 (E.D. Pa. 1973); *Lewis* v. *Marine Midland Grace Trust Co.*, CCH Fed. Sec. L. Rptr. para. 94,206 at p. 94,877 (S.D.N.Y. 1973); *Gordon* v. *Burr*, CCH Fed. Sec. L. Rptr. para. 94,221 at p. 94,910 (S.D.N.Y. 1973); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Fed. Sec. L. Rptr. para. 93,714 at p. 93,168 (S.D.N.Y. 1972).

See also: *Rochez Bros., Inc.* v. *Rhoades*, CCH Fed. Sec. L. Reptr. para. 94,339 (3d Cir. Dec. 21, 1973) at CCH pp. 95,149—95,150; *Arber* v. *Essex Wire Co.*, CCH Fed. Sec. L. Rptr. para. 94,357 (6th Cir. Jan. 8, 1974), n. 6 and n. 7 at CCH pp. 95,210-95,211.

Further illustrative of the continuing uncertainty which has developed out of *Mills* and *Ute* is *Cohen* v. *Franchard Corp.*, 478 F.2d 115 (2d Cir. 1973), *cert. denied* 94 S. Ct. 161 (1973), a class action under § 10(b) on behalf of purchasers of shares in a limited partnership. These plaintiffs were required to prove actual reliance, that is, that (p. 124) "the omitted fact must have been a substantial factor in plaintiff making a choice as to whether or not to buy." Indicating the need for clarification of the *Mills* and *Ute* cases, the Second Circuit pointed out that (n. 12 at p. 124):

> "... [T]he Supreme Court held that, *under the circumstances of those two cases,* it was unnecessary to prove actual reliance. It was enough that there were material misrepresentations in solicitation documents which were 'an essential link in the accomplishment of the transaction.' 396 U.S. at 385. The full implications of those decisions have not yet been determined [citing cases] . . . We decline to hold on the present state of the law that it was plain error for the district court in the instant case not to have instructed the jury according to the *Mills* and *Ute* formulations."

Hopkins was inexcusably disregardful of misstatements and facts which it did know and inexcusably ignorant of misstatements and facts which it could easily have found out. It "could readily have discovered the untrue statements and omissions about which it now complains", as the Court of Appeals held. In truth, Hopkins was the architect of its own misfortunes. But it has been permitted, nevertheless, to make Hutton a scapegoat for the recoupment of losses actually caused by its own derelictions. In the interests of orderly judicial administration this Court should now, we submit, clarify the prerequisites for liability which must be proven under § 10(b) of the 1934 Act and § 17(a) of the 1933 Act so that existing conflicts and confusion may be eliminated and more equal and exact justice be done in our Circuit and District Courts.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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January 30, 1974

ADDENDUM I

JUDGMENT

United States Court of Appeals

FOR THE

FOURTH CIRCUIT

THE JOHNS HOPKINS UNIVERSITY, *Appellee,* *vs.* WILLIAM E. HUTTON, JOSEPH A. W. IGLEHART, JAMES J. LEE, WILLIAM C. MILLER, EARL K. BASSETT, JOHN M. BLEAKIE, ERNEST E. KEUSCH, BENJAMIN D. WILLIAMS, JOHN J. ANGLIM, REGINALD N. BARNARD, JUSTIN J. STEVENSON, JR., J. LOGAN BURKE, JAMES M. HUTTON, III, THOMAS C. CAFONE, HART HAGIN, ET AL., *Appellants*	No. 72-1995

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part. The case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk

Filed
Dec. 4, 1973

WILLIAM K. SLATE, II
Clerk

ADDENDUM II

Statutes Involved

Section 12(2) of the Act of 1933 (15 USC § 771(2)) provides:

"Sec. 12. Any person who—

• • •

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Section 13 of the Act of 1933 (15 USC § 77m) provides:

"Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12(2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1), unless brought

within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12(1) more than three years after the security was bona fide offered to the public, or under section 12(2) more than three years after the sale."

Section 17(a) of the Act of 1933 [15 USC § 77q(a)] provides:

"Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10(b) of the Act of 1934 [15 USC § 78j(b)] provides:

"SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange—

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 of the Securities and Exchange Commission (17 CFR § 240.10b-5) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Certificate of Service

I hereby certify that on January 30, 1974, I served upon Respondent three copies of the foregoing Petition for a Writ of Certiorari and also three copies of the accompanying Appendix to Petition for Writ of Certiorari of Opinions Below by depositing said copies in a United States post office, with first class postage prepaid, addressed to Respondent's attorneys of record at their post office address:

John Henry Lewin, Esq. and
Edmund P. Dandridge, Jr., Esq.
1800 Mercantile Bank & Trust Building
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I further certify that all parties required to be served have been served.

JOHN A. WILSON
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Supreme Court, U. S.
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JAN 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1166

WILLIAM E. HUTTON; JOSEPH A. W. IGLEHART; JAMES J. LEE; WILLIAM C. MILLER; EARL K. BASSETT; JOHN M. BLEAKIE; ERNEST E. KEUSCH; BENJAMIN D. WILLIAMS; JOHN J. ANGLIM; REGINALD N. BARNARD; JUSTIN J. STEVENSON, JR.; J. LOGAN BURKE; JAMES M. HUTTON, III; THOMAS C. CAFONE; HART HAGIN; CLINTON J. COOMBS; ARTHUR T. HAMILL; JAMES M. HUTTON, III, EXECUTOR OF THE ESTATE OF DEFENDANT JAMES M. HUTTON, JR., DECEASED; ROBYN B. HALL, VERNON H. HALL, III AND DUDLEY HALL, EXECUTORS OF THE ESTATE OF DEFENDANT VERNON H. HALL, II, DECEASED; AND W. E. HUTTON & CO., A PARTNERSHIP,

Petitioners,

against

THE JOHNS HOPKINS UNIVERSITY,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI OF OPINIONS BELOW

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Appendix A

Opinion, Dated December 4, 1973

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 72-1995

THE JOHNS HOPKINS UNIVERSITY,
Appellee,

versus

WILLIAM E. HUTTON, JOSEPH A. W. IGLEHART, JAMES J. LEE, WILLIAM C. MILLER, EARL K. BASSETT, JOHN M. BLEAKIE, ERNEST E. KEUSCH, BENJAMIN D. WILLIAM, JOHN J. ANGLIM, REGINALD N. BARNARD, JUSTIN J. STEVENSON, JR., J. LOGAN BURKE, JAMES M. HUTTON, III, THOMAS C. CAFONE, HART HAGIN, CLINTON J. COOMBS, ARTHUR T. HAMILL, JAMES M. HUTTON, III, EXECUTOR OF THE ESTATE OF DEFENDANT JAMES M. HUTTON, JR., DECEASED, ROBYN B. HALL, VERNON H. HALL, III, AND DUDLEY HALL, EXECUTORS OF THE ESTATE OF DEFENDANT VERNON H. HALL, II, DECEASED, AND W. E. HUTTON & CO., A PARTNERSHIP,
Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Frank A. Kaufman, District Judge.

Argued February 5, 1973 Decided December 4, 1973

Opinion, Dated December 4, 1973

Before RUSSELL and FIELD, Circuit Judges, and BRYAN, District Judge.

John A. Wilson (Michael J. DeSantis, Lawrence G. Golde, John F. King and Shearman and Sterling on brief) for Appellants; John Henry Lewin and Edmund P. Dandridge, Jr., (Venable, Baetjer and Howard on Brief) for Appellee.

FIELD, Circuit Judge:

In this case which was before us over three years ago, W. E. Hutton & Company ("Hutton") now appeals from a summary judgment of rescission in favor of the plaintiff, The Johns Hopkins University ("Hopkins"), granted on counts II, III and V of Hopkins' amended complaint. Based upon the charge that Hutton's employee, Gilbert H. LaPiere, had been guilty of misrepresentations and nondisclosure incident to Hopkins' purchase of an oil and gas production payment from Trice Production Company, Hopkins' amended complaint was framed in seven counts: (I) Section 12(2) of the Securities Act of 1933[1]; (II) Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-3 of the Securities and Exchange Commission[3]; (III) Section 10(b) of the '34 Act and Rule 10b-5 of the Commission[4]; (IV) Section 15(c) (1) of the '34 Act[5]; (V) Section 17(a) of the '33 Act[6]; and (VI) and (VII) under the common law for (a) false representation and fraudulent conduct and (b) false representations negligently made with reckless indifference as to their truth.

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[1] 15 U.S.C. § 771 (2)
[2] 15 U.S.C. § 78j (b)
[3] 17 C.F.R. § 240.10b-3
[4] 17 C.F.R. § 240.10b-5
[5] 15 U.S.C. § 78o (c)(1)
[6] 15 U.S.C. § 77q (a)

Opinion, Dated December 4, 1973

On the former appeal[7] we had occasion to review the action of the district court in granting Hopkins' motion for summary judgment on count I involving the alleged violation of Section 12(2) of the '33 Act. In our disposition of that appeal we found the production payment to be a "security" within the statutory definition of the '33 Act and further concluded that the undisputed facts warranted the summary finding that Hutton's violation of Section 12(2) of the '33 Act entitled Hopkins to rescission. However, we noted the presence of a material factual controversy upon the issue as to whether Hopkins had commenced its action within "one year after the discovery of the untrue statement or the omission or after such discovery should have been made by the exercise of reasonable diligence" as required by Section 13 of the '33 Act.[8] We held that since Hutton had demanded a jury and the facts were susceptible of conflicting inferences on the issue of Hopkins' reasonable diligence, the issue under Section 13 should be submitted to a jury. To that end we remanded the case to the district court for further proceedings consistent with our opinion.

Upon remand, for some reason not at all clear to us, the district court did not proceed with the jury trial on the Section 13 issue under count I. Instead, the court permitted Hopkins to press its claim for summary judgment as to liability only under counts II, III and V of the complaint which were bottomed on Section 10(b) of the '34 Act and Section 17(a) of the '33 Act. Discerning support in our affirmance of facial liability under Section 12(2) on the former appeal, the district judge in an opinion filed in April of 1971 found that the undisputed facts sufficiently demonstated the presence of the requisite elements of scienter and

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[7] Johns Hopkins University *v.* Hutton, 422 F. 2d 1124, (4 Cir. 1970).

[8] 15 U.S.C. § 77m

reliance and granted summary judgment in favor of Hopkins with regard to liability under the three counts in question.[9]

We think the undisputed facts support the district court's summary finding of liability upon counts II, III and V. While our opinion on the former appeal was addressed only to the Section 12(2) claim, the undisputed evidence of LaPiere's misrepresentations and omissions to which we referred on that occasion would clearly supply the element of scienter necessary to support a cause of action under Sections 10(b) and 17. Reliance, of course, is not an operative element under the Section 12(2) count and we were not called upon to make a specific evaluation on that point in our former opinion. While the case of *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) has cast some doubt upon the part played by reliance in Rule 10b-5 cases, we do not find it necessary to concern ourselves with the dialogue of whether some degree of reliance is still a factor in face-to-face transactions involving misrepresentations and nondisclosure such as we presently have before us.[10] On the prior appeal we stated that "[i]nformation about future revenues was essential to Hopkins' decision to purchase, and this information was tainted by LaPiere's material misrepresentations and omissions," and assuming that in a case such as this some degree of reliance is necessary, we think the essentiality of the tainted information satisfies the accepted criteria of reliance which were delineated in *List* v. *Fashion Park, Inc.*, 340 F. 2d 457 (2 Cir.

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[9] Johns Hopkins University *v.* Hutton, 326 F. Supp. 250 (D.C. Md. 1971).

[10] *See* Simon *v.* Merrill Lynch, Pierce, Fenner and Smith, Inc., 482 F. 2d 880 (5 Cir. 1973); Chris-Craft Industries, Inc. *v.* Piper Aircraft Corp., 480 F. 2d 341 (2 Cir. 1973), *cert. denied* 42 U.S.L.W. 3227, (October 16, 1973); *Cf.* Kasner *v.* H. Hentz & Co., 475 F.2d 119 (5 Cir. 1973), *cert. denied* 42 U.S.L.W. 3194 (October 9, 1973), Ruder & Cross, Limitations on Civil Liability Under Rule 10b-5, Duke Law Journal, Vol. 1972:1125.

1965). *See Baumel* v. *Rosen,* 283 F. Supp. 128, 140 (D. C. Md. 1968), *reversed on other grounds* 412 F. 2d 571 (4 Cir. 1969).

Having found Hopkins entitled to summary judgment with respect to liability, the district court proceeded to discuss at some length the nature of the relief to which Hopkins might be entitled. While at this juncture Hopkins had asked only for damages under counts II, III and V, the district judge explored the possibility of rescission and, adverting to our opinion in *Baumel* v. *Rosen,* 412 F. 2d 571 (4 Cir. 1969), concluded that to obtain such relief "Hopkins must succeed at trial in establishing by the preponderance of the evidence that it demanded rescission 'within a reasonable time after discovery of the ground for rescission.' " The district judge determined that there was a triable issue of fact under count I relative to the Section 13 limitation issue, and also such a triable issue with respect to Hopkins' entitlement to rescission under counts II, III and V as to "whether Hopkins moved too slowly in its quest for rescission." As heretofore noted, Hopkins at that time had not asked for rescission with respect to counts II, III and V, and in the concluding paragraph of the opinion the district judge offered Hopkins the following options:

> "Hopkins is hereby required to inform this Court and Hutton within fourteen (14) days from the date of this opinion (a) whether Hopkins is primarily seeking rescission under one or more of Counts I, II, III and V and/or any other count, and, secondarily, damages under one or more of Counts II-VII, inclusive, only if Hopkins is held not entitled to rescission under any count; or (b) whether Hopkins desires to opt for damages and forego its quest for rescission; or (c) whether Hopkins asks that the pending discovery and evidentiary questions, all of which apparently pertain en-

tirely to damages, be determined by this Court before Hopkins makes the election posed by (a) and (b)."[11]

Responsive to this invitation, Hopkins advised the court by letter on April 20, 1971, that it was "primarily seeking rescission under counts II, III and V of the Complaint; secondly, rescission under count I; and damages under counts II, III and V only if Hopkins is not entitled to rescission under counts I, II, III and V." Some months thereafter, on January 7, 1972, with leave of the court, Hopkins filed an amendment to its complaint seeking, in addition to its demand for damages, relief by way of rescission on counts II through VII. The court also permitted Hutton to file an amendment to its answer alleging that Hopkins had failed to act with reasonable diligence in asserting rescission promptly and, additionally, was guilty of laches.[12]

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[11] Johns Hopkins University *v.* Hutton, supra, Note 9, at 265.

[12] The order entered on January 10, 1972, granting Hutton leave to amend its answer stated that it was "without prejudice to and without waiver of defendants' contentions set forth in their counsels' letter dated July 1, 1971, addressed to the court and on file." The letter referred to stated, *inter alia*, Hutton's contention that it was not required to affirmatively plead Hopkins' failure to assert rescission promptly after receiving inquiry notice since Hopkins had the burden of proving this as an element of its action for rescission. The question of the burden of proof was not before us on the former appeal, but it appears that Hutton's position on this point is well taken.

We note that the courts have consistently held that compliance with the limitation provision of Section 13 of the '33 Act is an essential ingredient of a private action under Section 12(2) which must be affirmatively asserted by the plaintiff. Newberg *v.* American Dryer Corporation, 195 F. Supp. 345 (E.D. Pa. 1961); Premier Industries *v.* Delaware Valley Financial Corp., 185 F. Supp. 694 (E.D. Pa. 1960); Shonts *v.* Hirliman, 28 F Supp. 478 (S.D. Cal. 1939); Fischman *v.* Raytheon Mfg. Co., 9 F.R.D. 707 (S.D. N.Y. 1949), *reversed on other grounds* 188 F. 2d 783 (2 Cir. 1951). Apparently this requirement of affirmative pleading under Section 13 has been applied in actions at law as well as those equitable in nature. With respect to counts II-VII, in the general area of rescission it appears that the requirement of prompt action is an element of the plaintiff's

Opinion, Dated December 4, 1973

In its final opinion filed in March of 1972,[13] the district court reaffirmed its earlier conclusion that Hutton was "entitled to a jury trial in connection with any and all triable fact issues with regard to whether Hopkins is entitled to rescission (a) under counts II, III and V in which Hopkins seeks relief pursuant to Section 10(b) of the Securities and Exchange Act of 1934 and Rules 10(b)-3 and 10b-5 promulgated thereunder, and also pursuant to Section 17(a) of the Securities Act of 1933, and/or (b) under count I in which Hopkins seeks relief under Section 12(2) of the Securities Act of 1933, so long as Hopkins continues to hold in reserve, in the event Hopkins is held not entitled to rescission, its claim for damages under one or more of counts II-VII, inclusive, of Hopkins' complaint."[14]

The Court, and we think properly, recognized this right of Hutton to a jury trial under the rationale of *Ross* v. *Bernhard*, 396 U. S. 531 (1970); *Dairy Queen* v. *Wood*, 369 U. S. 469 (1962); and *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). However, having recognized Hutton's theoretical right to a jury trial on these issues, the district judge concluded "that upon the current state of the record in this case and the undisputed facts disclosed

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case, and the burden is upon the rescinding party to show that he acted promptly in seeking rescission. *See* Friedman, Delay as a Bar to Rescission, Cornell Law Quarterly, Vol. 26 at 428, 452 (1941). The basis for placing this burden upon the rescinder is not addressed to the issue of liability, but stems from the drastic nature of the relief sought by the plaintiff, and it should be borne in mind that, failing rescission, the avenue of damages is still open to him. *See* Baumel *v.* Rosen, 412 F. 2d 571 (4 Cir. 1969); *Cf.* Myzel *v.* Fields 386 F. 2d 718 (8 Cir. 1967), cert. denied 390 U.S. 951.

[13] Johns Hopkins University *v.* Hutton, 343 F. Supp. 245 (D.C. Md. 1972).

[14] Id. at 248.

by it," Hopkins was entitled to a summary grant of rescissory relief under counts II, III and V. In reaching this conclusion the district judge took the position that Hopkins' conduct in seeking rescission under Sections 10(b) and 17 should be appraised under criteria substantially different from those imposed by Section 12(2) and the related Section 13 requirement. Recognizing that the one year limitation under Section 13 is tested to a large degree upon an objective standard of reasonable diligence on the part of the buyer in making discovery of the fraud, the district court suggested that in the context of the 10(b) and 17 claims a subjective test should be applied and that Hutton had the burden of proving that Hopkins had actual notice of the fraud substantially in advance of the date on which it asserted rescission. Support for this distinction was found by the district judge in the case of *Pence* v. *Langdon*, 99 U. S. 578 (1878), as well as his studied analysis of our opinion in *Baumel*. We fail to find *Pence*, which involved the review of a trial court's instructions in an action at law, persuasive on the issue before us, and we think the district court's reading of *Baumel* was much too restrictive.

Traditionally, federal equity doctrine has recognized that the discovery of fraud is either the date of actual discovery or the date on which the plaintiff in the exercise of reasonable diligence should have made such discovery. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946); *Bailey* v. *Glover*, 88 U. S. 342, 348 (1874). *See Wood* v. *Carpenter*, 101 U. S. 135 (1879). "Full and complete knowledge of an alleged fraud or breach of contract is not essential to impose upon a would-be rescinder the necessity of acting promptly and diligently if he wishes to assert a rescission. It is enough that he has such notice of the facts as would impel a reasonable man in his position to make inquiry.

Having such notice, he will be chargeable with knowledge of all the facts which inquiry would disclose." Friedman, *Delay as a Bar to Rescission,* 26 Cornell Law Quarterly, 426, 432 (April 1941). This principle is similarly stated in 3 *Pomeroy's Equity Jurisprudence* (5th Ed. 1941) § 917:

> "After he [the would-be rescinder] has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiesence * * *."

This objective approach has been uniformly applied by the courts in actions brought under both the 1933 and 1934 Securities Acts. In *Azalea Meats, Inc.* v. *Muscat,* 386 F. 2d 5, 8 (5 Cir. 1967), a case relied upon by Judge Butzner in his opinion on the former appeal, the court stated:

> "Insisting upon a subjective test of actual knowledge, appellant contends that the pertinent Florida statute of limitations did not commence to run until it discovered, on September 17, 1964, the material facts upon which it relies for a recovery of damages for a fraud perpetrated by appellees. This circuit, however, is committed to the more objective approach to the accrual of such an action, articulated in Goldenberg *v.* Bache & Co., 270 F. 2d 675, 681 (5th Cir. 1959), as follows: 'Discovery' within the meaning of the statute, 15 U.S.C.A. § 78cc(b) * * * is to be determined, we think, according to an objective standard; that is, 'discovery' means either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." (Footnote omitted.)

Thus, it was not any unique factual contours of *Baumel* which provoked Judge Bryan to state the principle which we find applicable to the present case:

> "Rescission is a radical move, and the law exacts the election of that course to be asserted without wait. The demand is that advice of the determination be given within a reasonable time after discovery of the ground for rescission.
>
> This principle is stringently administered. *Reasonable time is inceptive from the receipt by the rescinder of word putting him on notice. It is then incumbent upon him to pick up the scent and nose to the source.* * * * (citation omitted). If the quest confirms the suspicion, then he must make decision with reasonable dispatch. Failing this, entitlement to rescission disappears." (Emphasis added) 412 F. 2d, *supra,* at 574.

In substance we hold that Hopkins, in seeking rescission under Sections 10(b) and 17, was required to act with reasonable dispatch after it had either actual knowledge of the fraud or notice of facts which, in the exercise of due diligence, would have led to knowledge thereof.

The district judge referred to certain facts which had been developed since his 1971 opinion and found that the record as amplified disclosed no delay on the part of Hopkins. In our opinion, the facts to which the district court referred represent grist for the mill of the jury similar to those detailed by Judge Butzner in his opinion on the first appeal; and since they are susceptible of conflicting inferences on the issue of reasonable diligence, that question *must* be submitted to the jury. "The concept of due diligence is not imprisoned within the frame of a rigid stand-

ard; it is protean in application. • • • Inevitably the factual issue of due diligence involves, to some extent at least, the state of mind of the person whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment." *Azalea Meats, Inc.* v. *Muscat, supra,* 386 F. 2d at 9 & 10. This, of course, accords with the principle followed in this circuit that summary judgment "should be granted only where it is perfectly clear that no issue of fact is involved • • • and this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusion to be drawn therefrom." *Stevens* v. *Howard D. Johnson Co.,* 181 F. 2d 390, 394 (4 Cir. 1950).

Finding summary judgment inappropriate on the issue of Hopkins' promptitude, we reverse the decree of the district court in that respect and remand for a jury trial upon the issue of whether Hopkins demanded rescission within a reasonable time after it had actual knowledge of the grounds for rescission or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of such grounds. Since this case has now been pending for over ten years, a final determination of the issues and the rights of the litigants should be made at the earliest possible date. To that end we also direct the district court to submit to the jury the issue with respect to the Section 13 limitation under the first count of the complaint in accordance with our mandate on the first appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Appendix B

Opinion, Dated April 12, 1971

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

THE JOHNS HOPKINS UNIVERSITY *v.* JAMES M. HUTTON, JR., ET AL.	CIVIL NO. 15098

Filed: April 12, 1971

JOHN HENRY LEWIN, EDMUND P. DANDRIDGE, JR., and VENABLE, BAETJER AND HOWARD, of Baltimore, Maryland, for Plaintiff.

JOHN A. WILSON, MICHAEL J. DESANTIS, and SHEARMAN AND STERLING, of New York, New York; and JOHN F. KING, of Baltimore, Maryland, for Defendants.

KAUFMAN, DISTRICT JUDGE

This seven count action was instituted by Hopkins in 1963. Five years later, after protracted and extensive discovery had been engaged in by both sides, this Court granted Hopkins' motion for summary judgment under the first count stated by Hopkins pursuant to Section 12(2) of the Securities Act of 1933 (the '33 Act). *Hopkins* v. *Hutton*, 297 F. Supp. 1165 (D. Md. 1968). The Fourth Circuit, on appeal, held that "genuine issues of material fact preclude[d] the entry of summary judgment on the issue raised by Hutton's plea of the statute of limitations" but that "[o]n all other issues, the district court correctly entered summary judgment for Hopkins." *Hopkins* v. *Hutton*, 422 F.2d 1124, 1126 (4th Cir. 1970).[1] Accordingly,

[1] In connection with Hutton's Section 13 limitations plea, the question posed is whether Hopkins, insofar as the first count under Section 12(2) of the '33 Act is concerned, filed this action within one

the Fourth Circuit "[a]ffirmed in part, reversed in part, and remanded for further proceedings consistent with [its] opinion." 422 F.2d, *supra* at 1132.

In its earlier opinion, this Court wrote (297 F. Supp., *supra* at 1172-73):

> Hopkins' amended complaint is set forth in seven counts: (1) Section 12(2) of the '33 Act; (2) Section 10(b) of the '34 Act and Rule 10b-3 of the Securities and Exchange Commission (S.E.C.); (3) Section 10(b) of the '34 Act and Rule 10b-5 of the S.E.C.; (4) Section 15(c)(1) of the '34 Act; (5) Section 17(a) of the '33 Act; and (6) and (7) under the common law for (a) false representation and fraudulent conduct and (b) making false representations negligently and with reckless indifference as to their truth.
>
> Hopkins' motion for summary judgment was presented with regard to each of the first five or statutory counts. Near the close of his rebuttal, during oral argument on Hopkins' motion for summary judgment, Hopkins' counsel stated that if the Section 12(2) equitable relief sought by Hopkins under count one of the amended complaint should be granted, Hopkins would consider itself fully satisfied (Tr. 458-463). Therefore, since summary judgment will be granted to Hopkins under count one, the issues raised by the other counts are moot. [Footnote omitted.]

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year after the moment when Hopkins discovered, or, by the exercise of reasonable diligence, should have discovered, LaPiere's misrepresentations and omissions. Judge Butzner (422 F.2d, *supra* at 1131) held that that issue raised, in this case, a factual dispute which could not be determined on summary judgment. Judge Butzner also wrote (at 1131, n.7):

> Hopkins also claims that Hutton is estopped to plead the statute of limitations because Hutton withheld unfavorable information that came to its attention after the sale. The district judge did not rule on this issue, and in the absence of the necessary factual background, we express no opinion about it.

That estoppel contention, even if it poses questions in addition to those presented by Hutton's limitations plea, raises factual issues hereir which cannot be determined short of trial.

B-3

Opinion, Dated April 12, 1971

Following the remand of this case by the Fourth Circuit to this Court, Hopkins pressed its claims for summary judgment, as to liability only, under the second,[2] third,[3] and fifth counts.[4]

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[2] The second count is stated under Section 10(b) of the Securities Exchange Act of 1934 (the '34 Act) and Rule 10b-3 of the Securities and Exchange Commission (S.E.C.). Section 10(b) provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-3 reads:

Employment of manipulative and deceptive devices, by brokers or dealers.

It shall be unlawful for *any broker or dealer,* directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive, or other fraudulent device or contrivance", as such term is used in section 15(c)(1) of the act. [Emphasis supplied.]

Rule 15c1-2 states:

Fraud and misrepresentation.

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section 15(c)(1) of the act (sec. 2, 52 Stat. 1075; 15 U.S.C. 78o(c)(1)), is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section 15(c)(1) of the act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or

Additionally, both sides have presented their respective contentions concerning standards applicable in con-

omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this section shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to section 15(c)(1) of the act.

[3] The third count is stated under Section 10(b) of the '34 Act and under Rule 10b-5 of the S.E.C. That Rule reads as follows:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[4] The fifth count is stated under Section 17(a) of the '33 Act, which provides:

Fraudulent interestate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Hopkins has not sought summary judgment under Count IV, VI or VII. Count IV is based upon section 15(c)(1) of the '34 Act and Rule 15c1-2(a) and (b) promulgated thereunder. Counts VI and VII are common law counts.

nection with the determination of damages under one or more of the counts.[5]

Further, Hopkins has also filed motions to strike Hutton's demand for a jury trial under Count I (the Section 12(2) count) and to sever that count for separate trial.

While the earlier opinions in this case of the Fourth Circuit and of this Court were written in the context of Hopkins' Section 12(2) summary judgment motion, and not in the context of Hopkins' current 10b-3, 10b-5 and 17(a) motions, the underlying findings of fact previously made by this Court and approved by the Fourth Circuit provide the factual underpinnings for determination of those issues which are raised by Hopkins' pending summary judgment motions. After review and reconsideration of the record to date, this Court declines, as suggested by Hutton, to revise, and also declines, as suggested by Hopkins, to amplify, any of its earlier factual determinations.

I. Sections 10(b) and 17(a)

The elements of the three counts, brought under 10(b) and 17(a), are almost identical. Many of those elements are also substantially similar to comparable elements in the 12(2) cause of action. Thus, Hutton violated Rules 10b-3 and 10b-5 and Section 10(b) of the '34 Act, and Section 17(a) of the '33 Act, if, as a broker,[6] Hutton, by use of the mails or any means or instrumentality of interstate

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[5] The parties have also presented a number of discovery and evidentiary questions which will require resolution if this case goes to trial in connection with any damage issue.

[6] Rule 10b-5 and Section 10(b) of the '34 Act and Section 17(a) of the '33 Act make it unlawful for "any person" to engage in the conduct proscribed by those provisions. Rule 10b-3 refers only to brokers or dealers. (*See* n.2, n.3 and n.4 *supra*).

commerce, knowingly, in connection with the sale[7] of a security to Hopkins, made an untrue statement of material fact, and, knowingly, in that connection, omitted to state a material fact necessary in order to render the statements Hutton made not misleading under the circumstances in which the statements were made, and Hopkins, in ignorance of the truth, relied upon misleading information furnished to it by Hutton or relied upon the information in fact furnished by Hutton not knowing of the omitted material information. The findings and holdings of the Fourth Circuit and of this Court in the earlier opinions have established that the production payment sold to Hopkins was a security;[8] that Hutton is responsible for LaPiere's mis-

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[7] Purchasers, such as Hopkins, can bring actions under Rules 10b-3 and 10b-5 and Section 17(a). Professor Loss has noted, III L. Loss, SECURITIES REGULATION 1427 (1961 ed.) (hereafter "*Loss*"), that Rule 10b-5 "merely borrows the language of § 17(a) . . . except for the reference in Clause (2) [of Section 17(a)] to *obtaining money or property by means of* an untrue statement or half-truth . . ." (emphasis in original); and that Rule 10b-5 "applies" those words of Section 17(a) to occurrences "in connection with the purchase or sale of any security" (with regard to the original purpose of the words "obtaining money or property," see III *Loss* at 1439). Section 17(a) itself speaks of occurrences "*in* the offer or sale of securities" (emphasis supplied). In this case, LaPiere obtained for Trice money from Hopkins not only *in connection with* a sale, but directly as the consideration for the sale. Thus, herein, it is not necessary to analyze whether the Rule 10b-5 words—"*in connection with* the purchase or sale"—can in some factual settings have broader application than the Section 17(a) words—"*in* the offer or sale" (emphases supplied). *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 858-62 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); III *Loss* at 1454, n.35.

[8] The term "security," as used in the '33 Act, is defined by Section 2(1) thereof as follows:

> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided

representations and omissions (297 F. Supp., *supra* at 1209-13, 1236-37; 422 F.2d, *supra* at 1130); that LaPiere did make material misrepresentations and omitted to furnish Hopkins with material information LaPiere possessed

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> interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The term "security," as used in Section 10(b) of the '34 Act and in Rules 10b-3 and 10b-5, is defined in Section 3(a)(10) of the Act as follows:

> (10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

The Supreme Court in Tcherepnin v. Knight, 389 U.S. 332 (1967), considered the respective definitions in the two Acts to be "virtually identical" (at 336 and 342). In both Acts, the definition of a security includes an "investment contract." The Fourth Circuit, affirming this Court's determination (297 F. Supp., *supra* at 1214-17), held the production payment in this case to be an "investment contract" and a "security" (422 F.2d, *supra* at 1127, 1128) and, with regard to the Trice guarantee, wrote (at 1128):

> * * * Whether the guarantee is a part of the production payment or collateral to it is immaterial. In either event the entire transaction, including the guarantee, falls within the statutory definition of a security.

Thus, the absence of the word "guarantee" from the '34 Act definition, and its presence in the '33 Act definition, *see* II *Loss* at 795-96, is immaterial in this case since the "entire transaction" falls within the definition of "investment contract" and of "security" as those words are used in the '34 Act.

(297 F. Supp., *supra* at 1217-18; 422 F.2d, *supra* at 1128-29); that the mails or facilities of interstate commerce were used by LaPiere in connection therewith (297 F. Supp., *supra* at 1213-14; 422 F.2d, *supra* at 1128); that Hopkins is a type of investor entitled to protection under the federal securities laws (297 F. Supp., *supra* at 1217); and that Hopkins did not have knowledge of LaPiere's material misstatements and material omissions prior to the consummation of Hopkins' purchase of the production payment (297 F. Supp., *supra* at 1220-22; 422 F.2d, *supra* at 1129).

A. SCIENTER

This Court repeats its refusal to find, in the current summary judgment context of this case, that LaPiere acted "as an evil man," 297 F. Supp., *supra* at 1198, n.20, but also repeats its conclusion (at 297 F. Supp., *supra* at 1219-20) that a—

> * * * buyer under Section 12(2) does not have to prove that the seller had a subjectively evil state of mind in making false statements or omissions. Further, in order to avoid liability, if all of the other elements of a 12(2) cause of action exist, a seller must show that he did not know of the misstatements or omissions, or could not have known of them, in the exercise of reasonable care. * * *
>
> The standards of 12(2) are clear when it comes to ascertaining whether LaPiere's conduct is actionable. What did LaPiere know? What could he have known in the exercise of reasonable care? The undisputed facts speak loudly and clearly as to what information LaPiere had in his possession. There is no evidence in the record that LaPiere did not have, or that it would

> be possible to prove that he did not have, such information in his possession and that LaPiere did not know and could not have known with the exercise of reasonable diligence that he made material misstatements and material omissions in his communications to Hopkins. * * * [Citations omitted.]

Under Section 12(2) of the '33 Act, the burden is upon the defendant to prove that "he did not know, and in the exericse of reasonable care could not have known" of the false or misleading nature of the misstatement or omission upon which liability under that section is alleged. In actions under Sections 10(b) of the '34 Act and 17(a) of the '33 Act, the element of scienter must be proved by the plaintiff. Sitting by designation in this Court as a District Judge in *Baumel* v. *Rosen*, 283 F. Supp. 128 (D. Md. 1968), *aff'd in part, rev'd in part*, 412 F.2d 571 (4th Cir. 1969)[9], *cert denied*, 396 U.S. 1037 (1970), Judge Winter noted (at 139):

> * * * Numerous authorities have discussed the quantum of proof to sustain a cause of action under Rule 10b-5 and how a cause of action under Rule 10b-5 differs from a cause of action for common law fraud. * * *

After reviewing the authorities, Judge Winter concluded (at 140):

> * * * In the view of the Court, Rule 10b-5 should be so construed to give effect to its remedial purpose and the remedial purpose of the Act under which it was adopted S.E.C. *v.* Capital Gains Research Bureau,

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[9] Judge Bryan, for the Fourth Circuit, specifically approved (at 573) of the analysis of the Act (Section 10(b) of the '34 Act) and the Rule (10b-5) by the Court below.

375 U.S. 180, 195, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963). It follows that proof of common law fraud is not required to sustain a cause of action under Rule 10b-5.

In *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1290 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) a case involving both 10b-5 and 17(a), the Second Circuit, in approving the District Court's jury charge, wrote:

> The jury was told that before the appellants could be held liable to plaintiffs, it must conclude that appellants "knew the statement was misleading or *knew of the existence of facts which, if disclosed, would have shown it to be misleading.*" The trial court thus shared the view often advanced in this circuit that some form of scienter greater than mere negligence was required in order to permit plaintiffs to recover damages in a private action under 17(a) or 10(b). * * * But the trial judge refused to direct the jury that it must find appellants intended to defraud appellees before it determined that there was a violation of either of those sections.
>
> The necessity of some intent to defraud or scienter has been the subject of much debate. * * * But the trend is clearly away from enforcing a scienter requirement equal to the "intent to defraud" required for common law fraud. Before there may be a violation of the securities acts there need not be present all of the same elements essential to a common law fraud, ... [Emphasis supplied; citations omitted.]

See also S. E. C. v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 854-55 (2d Cir. 1968); *Myzel* v. *Fields*, 386 F.2d 718, 734-35 (8th Cir. 1967), *cert. denied*, 389 U. S. 951 (1968); and

Kohler v. *Kohler*, 319 F.2d 634, 637 (7th Cir. 1963), where it was held that Section 10(b)—

> * * * was meant to cover more than deliberately and dishonestly misrepresenting or omitting material facts which ordinarily are badges of fraud and deceit. See Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Texas Continental Life Ins. Co. *v.* Bankers Bond Co., 187 F. Supp. 14 (W. D. Ky. 1960).

In this case, the record discloses, as the Fourth Circuit and this Court have found and held, evidence which establishes beyond question that LaPiere "knew of the existence" of material facts which he failed to disclose to Hopkins. As Judge Butzner wrote (422 F.2d, *supra* at 1128):

> * * * LaPiere, however, *knew* that D & M had neither estimated all of the wells nor provided a basis for calculating Hopkins' share of the future net revenues. Moreover, LaPiere omitted to tell Hopkins that in order to show future net revenues of $6,500,000 it was necessary to substitute for conservative estimates on some of the wells higher estimates from other sources. [Emphasis supplied.]

Accordingly, this Court concludes that, in this case, the undisputed facts provide the required quantum of scienter.

B. RELIANCE

In the earlier opinions in this case, the Fourth Circuit and this Court have held that reliance by the purchaser is not an element of a cause of action under Section 12(2) of the '33 Act. 422 F.2d, *supra* at 1129-30; 297 F. Supp., *supra* at 1222-23. However, in 10(b) actions, "most of the

authorities require *some* reliance by the plaintiff upon the data that was furnished" (emphasis supplied). *Baumel v. Rosen,* 283 F. Supp., *supra* at 140. In *Baumel,* Judge Winter cited, *inter alia, List* v. *Fashion Park, Inc.,* 340 F.2d 457 (2d Cir.), *cert. denied,* 382 U.S. 811 (1965), in which the Second Circuit held in a 10(b) case that the plaintiff must show reliance, in order to establish causation, and materiality, and in which the Second Circuit wrote (at 462):

> • • • Insofar as is pertinent here, the test of "reliance" is whether "the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss." Restatement, Torts § 546 (1938); accord, Prosser, Torts 550 (2 ed. 1955); 1 Harper & James, Torts 583-84 (1956). The reason for this requirement, as explained by the authorities cited, is to certify that the conduct of the defendant actually caused the plaintiff's injury. The basic test of "materiality," on the other hand, is whether "a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question." Restatement, Torts § 538(2)(a); accord, Prosser, Torts 554-55; 1 Harper & James, Torts 565-66. Thus, to the requirement that the *individual plaintiff* must have acted upon the fact misrepresented, is added the parallel requirement that a *reasonable man* would also have acted upon the fact misrepresented.[3] [Emphasis in original.]

Footnote 3 in the *List* opinion states:

> 3. Care must be taken to distinguish the requirement that a reasonable man would have *believed* the fact misrepresented. There is a marked present-day trend away from this common law requirement.

> Prosser, Torts 552-54; 1 Harper & James, Torts 582-83. The requirement may not exist at all under Rule 10b-5. See III Loss, Securities Regulation 1438. [Emphasis in original.][10]

Even if that "right to rely" requirement exists in this case, there is nothing in the record to indicate that LaPiere, or anyone else, did or said anything which would have led Hopkins, as a reasonable man, to suspect that material information was being misrepresented to or withheld from Hopkins. LaPiere's misrepresentations and omissions were not obvious to "even the most credulous mind." *Clement A. Evans & Co., Inc.* v. *McAlpine,* _____ F.2d _____, CCH Fed. Sec. L. Rep. ¶ 92,858 at p. 90,205 (5th Cir. November 5, 1970). Nor did Hopkins have "ready access to the information" which LaPiere misrepresented or omitted to furnish. *City National Bank of Fort Smith, Ark.* v. *Vanderboom,* 422 F.2d 221, 231 (8th Cir.), *cert. denied,* 399 U.S. 905 (1970). *See Gordon* v. *Lipoff,* _____ F. Supp. _____, CCH Fed. Sec. L. Rep. ¶ 92,926 at pp. 90,424-26 (W.D. Mo. December 30,

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[10] In Bishop v. E. A. Strout Realty Agency, 182 F.2d 503 (4th Cir. 1950), a case of common law deceit, Judge Parker wrote (at 505):

> We do not think that plaintiffs are precluded of recovery because they accepted and relied upon the representations of Davis as to the depth of the water without making soundings or taking other steps to ascertain their truth or falsity. The depth of the water was not a matter that was apparent to ordinary observation; Davis professed to know whereof he was speaking; and there was nothing to put plaintiffs on notice that he was not speaking the truth. There is nothing in law or in reason which requires one to deal as though dealing with a liar or a scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud. The principle underlying the caveat emptor rule was more highly regarded in former times than it is today; but it was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed. * * *

1970). *See also* the discussion by this Court in the context of 12(2) at 297 F. Supp., *supra* at 1221.

To return to *List* v. *Fashion Park, Inc.*, 340 F.2d, *supra*, it is to be noted that Judge Waterman, in holding that misrepresentation must be "a substantial factor in determining the course of conduct which results in [the recipient's] loss," wrote (at 462-63):

> • • • The reason for this [reliance] requirement, as explained by the authorities cited, is to certify that the conduct of the defendant actually caused the plaintiff's injury. • • •
>
> • • •
>
> • • • Assuredly, to abandon the requirement of reliance would be to facilitate outsiders' proof of insiders' fraud, and to that extent the interpretation for which plaintiff contends might advance the purposes of Rule 10b-5. But this strikes us as an inadequate reason for reading out of the rule so basic an element of tort law as the principle of causation in fact. • • • [11]

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[11] It may indeed be that the reliance requirement in fraud actions analytically functions principally to establish the causal connection between the wrongful conduct and the resulting damage. *See, e.g.*, W. PROSSER, LAW OF TORTS (3d ed. 1964), at 729-30; L. HARPER & F. JAMES, THE LAW OF TORTS § 7.13; *and see* Crane Company v. Westinghouse Air Brake Company, 419 F.2d 787, 797 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); Vine v. Beneficial Finance Co., 374 F.2d 627, 635 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967); Voege v. American Sumatra Tobacco Corporation, 241 F. Supp. 369, 375-76 (D.Del. 1965) for cases in which the plaintiff was not required to show reliance since the causal connection between violation of the Act and the resulting injury was otherwise alleged or proved. *See also* Chasins v. Smith, Barney & Co., ... F.2d ..... (2d Cir. March 2, 1971). *And see* Robinson v. Cupples Container Co., 316 F. Supp. 1362, 1365-66 (N.D. Cal. 1970) ("causation" sufficiently alleged in complaint by allegation of reliance).

However, as the Second Circuit recently stated in *Crane Company* v. *Westinghouse Air Brake Company,* 419 F.2d 787, 797 (2d Cir. 1969):

> • • • Although we have held that reliance was necessary under 10b-5, List v. Fashion Park, Inc., *supra,* at 340 F.2d 463, reliance is an element of causation which plays little role in nondisclosure cases. • • •

See also Chasins v. *Smith, Barney & Co., Inc.,* ------ F.2D ------ (2d Cir. March 2, 1971).[12] And in VI *Loss* (1969 Supp.) at 3879, the author wrote:

> The Government, in filing a memorandum [in the *List* case] as *amicus curiae* on the petition for a writ of *certiorari,* took exception to the Second Circuit's formulation: Framing the test in terms of "reliance" is not particularly helpful when dealing with complete nondisclosure. The appropriate inquiry there is whether the nondisclosure caused the injury. • • •

There is a factual difference between complete nondisclosure, *e.g.,* failure of the buyer to disclose he is an insider, as opposed to partial disclosure with a material omission, but, in this case, LaPiere's "causation" of Hopkins' injury, by the combination of his misrepresentations and omissions, has been established, as the Fourth Circuit found and held (422 F.2d, *supra* at 1130):

> • • • Information about future net revenues was essential to Hopkins' decision to purchase, and this information was tainted by LaPiere's material misrepresentations and omissions. These facts establish as a matter of law sufficient causal relationship between

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[12] In *Chasins,* the Second Circuit held that "[t]o the extent that reliance is necessary for a finding of a 10b-5 violation in a nondisclosure case such as this, the test is properly one of tort 'causation in fact.'" (Page 8 of the slip opinion).

> LaPiere's violation of the Act and Hopkins' injury. Hopkins need not also prove that the defects in LaPiere's data had a decisive effect on its contract. Cf. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). • • •

Mills v. *Electric Auto-Lite Co.*, cited by the Fourth Circuit in the portion of its opinion in this case quoted immediately *supra*, was a derivative action by stockholders of Electric Auto-Lite brought on behalf of the company under Section 14(a) of the Exchange Act and Rule 14a-9 to attack Electric Auto-Lite's merger into Linotype Company, on the ground that the proxy solicitation for the vote to approve the merger was misleading because it omitted material facts. The District Court granted plaintiffs' summary judgment on the issue of liability, 281 F. Supp. 826 (N.D. Ill. 1967). The Seventh Circuit remanded for determination of "whether the misleading statement and omission caused the submission of sufficient proxies." (403 F.2d 429, 436 (1968)). After noting (at 380) that "[t]he Court of Appeals acknowledged that this test corresponds to the common-law fraud test of whether the injured party relied on the misrepresentation," the Supreme Court reversed, stating (at 384-85):

> Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so

> trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14(a).
>
> There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions. CF. Union Pac. R. Co. v. Chicago & N. W. R. Co., 226 F.Supp. 400, 411 (D.C. N.D. Ill. 1964); 2 L. Loss, Securities Regulation 962, n. 411 (2d ed. 1961); 5 id., at 2929-2930 (Supp. 1969). [Footnotes omitted; emphasis in original.]

In *Mills,* the Supreme Court noted the "impracticalities" (at 385) of inquiring into "[r]eliance by thousands of individuals" (at 380). *See also Kahan* v. *Rosenstiel,* 424 F.2d 161, 173-74 (3d Cir. 1970) (a class action, brought pursuant to Rule 10b-5 in which the Third Circuit cited and applied *Mills* on the question of reliance).

Hopkins contends that *Mills* (and *Rosenstiel*) have dispensed with the requirement of reliance, *per se,* in 10(b) and similar cases, where materiality and causation are

present. This Court, in this case, does not need herein to accept or repudiate that contention, since, in this case, inquiry into the fact of reliance is not impractical and such inquiry undisputedly establishes LaPiere's misrepresentations and omissions, their materiality, and Hopkins' reliance upon them. Materiality presents the identical factual and legal questions under the 10(b) and 17(a) counts in this case as under the 12(2) count, and thus has already been determined by the Fourth Circuit's affirmance (422 F.2d, *supra* at 1128-29) of this Court's determination of materiality under the 12(2) count (297 F. Supp., *supra* at 1217-18).[13] While reliance as a legal concept was not considered, as such, by either the Fourth Circuit or by this Court in connection with the 12(2) count, both opinions set forth factual determinations that Hopkins did in fact act upon and indeed seek information from LaPiere concerning the oil reserves and that LaPiere induced Hopkins to purchase the production payment. It is not necessary that Hopkins, in making its decision to purchase, relied solely on the information LaPiere presented to it. It is only necessary that that information was "a substantial factor in determining the course of conduct which results in [the recipient's, here Hopkins'] loss." *List* v. *Fashion Park, Inc., supra* at 462. The record in this case leaves no doubt that Hopkins asked for, was furnished with, and carefully considered all data concerning oil reserves. And it was in connection with just such data that LaPiere made misrepresentations and omissions. Hopkins' reliance in this case thus exceeds the degree of "some"—the standard set forth

[13] Thus, Judge Butzner wrote (at 1129-30) that "[c]learly, a 'reasonable man would attach importance' to this discrepancy of over a million dollars"; that "the discrepancies in basic data are so large, and the facts misrepresented and withheld are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality"; and that "[i]nformation about future net revenues was essential to Hopkins' decision to purchase, and this information was tainted by LaPiere's material misrepresentations and omissions."

by Judge Winter in *Baumel* v. *Rosen, supra* at 140, in the course of setting forth his "reading" and "employment" of Section 10(b) and Rule 10b-5—a "reading" and an "employment" which were specifically approved by Judge Bryan, speaking for himself and Judges Sobeloff and Boreman. 412 F.2d, *supra* at 574. In this case, materiality and causation, and reliance in and of itself, are independently established by the undisputed facts insofar as the two 10(b) counts are concerned.

C. SECTION 17(a)

The Section 17(a) count requires no greater quantum of scienter on the part of Hutton, or of reliance by Hopkins, than is required in 10b actions. Nor does Section 17(a) establish any higher standards with regard to a plaintiff's "right to rely" than do Section 10(b) and Rules 10b-3 and 10b-5. In this case, the undisputed facts fit the statutory and regulatory requirements of Section 10(b), of Rules 10b-3 and 10b-5, and of Section 17(a), and of each of the elements thereof. Therefore, Hopkins is entitled to summary judgment with regard to liability under the second (10b-3), the third (10b-5), and the fifth (17(a)) counts.

II. Nature of Relief

The question is presented as to whether Hopkins, being entitled to relief under each of those three counts, has the right to elect to rescind its transaction with Hutton and to receive back the $1,300,000 it paid for the production payment plus interest,[14] or whether Hopkins is confined to damage relief under those counts. Hopkins' right, under those counts, to rescind its transaction is governed by the

[14] At the rate of 6% from March 1, 1961 as set forth in this Court's decree in connection with its earlier (and partially reversed) grant of summary judgment under the 12(2) count. 297 F.Supp., *supra* at 1227-30.

standards set forth in *Baumel* v. *Rosen,* 412 F.2d, *supra.* In that 10b-5 case, Judge Bryan held that plaintiffs were entitled to damages but were not entitled to rescind because they had not tendered the return of the shares of stock involved in *Baumel* until too long after the date upon which they had discovered that the defendants, as purchasers and corporate insiders, had made material misrepresentations and had omitted to disclose material facts concerning the value of the shares of stock sold by plaintiffs. Judge Bryan wrote (412 F.2d at 574):

> * * * Rescission is a radical move, and the law exacts the election of that course to be asserted without wait. The demand is that advice of the determination be given within a reasonable time after discovery of the ground for rescission.
>
> This principle is stringently administered. Reasonable time is inceptive from the receipt by the rescinder of word putting him on notice. It is then incumbent upon him to pick up the scent and nose to the source. See Friedman, Delay As a Bar to Rescission, 26 Cornell Law Quarterly 426, 432, text at footnote 31 and authorities cited therein (April 1941). If the quest confirms the suspicion, then he must make decision with reasonable dispatch. Failing this, entitlement to rescission disappears.

In this case, the Fourth Circuit, in reversing this Court's grant of full summary judgment under the first (12(2)) count, held that there were "genuine issues of material fact" in connection with whether Hopkins "used due diligence after its purchase on March 1, 1961 to discover the wrongs about which it now complains" (422 F.2d, *supra* at 1126, 1130) and also whether, prior to November 1, 1963,[15] Hopkins' conduct met the test of the "objective

[15] Hopkins instituted this suit on November 1, 1963. See n.1, *supra.*

standard of reasonable diligence on the part of the buyer in making discovery" (422 F.2d, *supra* at 1131). Similarly, under the standard established in *Baumel* by Judge Bryan, the question of whether Hopkins has timely sought rescission presents, under the second, third and fifth counts, a triable issue of fact. True, Hopkins tendered the production payment to Hutton not later than the time Hopkins filed this suit (297 F. Supp., *supra* at 1224, n.33). But whether Hopkins should have tendered and/or commenced suit earlier than November 1, 1963 depends upon whether Hopkins should have, before that date, "pick[ed] up the scent and nose[d] to the source" (412 F.2d, *supra* at 574). Hopkins is thus not entitled to the summary grant of relief in the form of rescission under Count II, III or V. To gain that result, Hopkins must succeed at trial in establishing by the preponderance of the evidence that it demanded rescission "within a reasonable time after discovery of the ground for rescission" (412 F.2d, *supra* at 574).

Hopkins is, however, if it so desires, entitled to opt for damages under Counts II, III and V rather than for rescission.[16] Seemingly, the measure of damages under each of those counts would be the same. And the standard which would prevail would be that embodied in the so-called "out-of-pocket" rule. *Sackett* v. *Beaman,* 399 F.2d 884, 891 (9th Cir. 1968); *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.,* 303 F.2d 527, 533 (10th Cir. 1962); *Kohler* v. *Kohler Co.,* 208 F. Supp. 808, 825 (E.D. Wisc. 1962), *aff'd,* 319 F.2d 634 (7th Cir. 1963); *see also Myzel* v. *Fields,* 386 F.2d, *supra* at 745-47; *Janigan* v. *Taylor,* 344 F. 2d 781, 786 (1st Cir.), *cert. denied,* 382 U.S. 879 (1965). While it has been suggested that the benefit of the bargain rule may "maximize

[16] As will be discussed *infra,* at p. 25, Hopkins has no such available election under the 12(2) count (Count I).

the deterrent effect of Rule 10b-5," VI *Loss* (1969 Supp.) at 3923, no one has specifically advocated that a broker, such as Hutton, as opposed to a seller, such as Trice, should be subjected to that latter rule. And Judge Bryan's comment in *Baumel* (412 F.2d, *supra* at 576), that "[i]t must be recalled that while a defrauding party is not to be excused, neither is he to be punished," is the coup de grace to Hopkins' plea to this Court to blaze a new trail, to give to Hopkins the benefit of its bargain with Trice at the expense of Hutton, to require Hutton to make good that bargain which Hopkins thought it had purchased from Trice, and hopefully, as Hopkins seems to put it, to increase the possibility of deterring future LaPieres from misrepresenting or omitting to disclose material facts to prospective purchasers.

III. Jury

There remains Hopkins' motion to strike Hutton's jury demand with regard to Count I under 12(2) and to sever that count for trial. The determination of the questions raised by that motion requires an analysis of the several avenues of relief which Hopkins may pursue under the seven counts in this case, their relationship to one another, and the application of the Seventh Amendment's jury trial guarantee to each of those avenues of relief.

This Court has earlier determined that "Hopkins' only remedy under 12(2) is by way of rescission" (297 F. Supp., *supra* at 1226). Judge Butzner did not specifically state that rescission was the *only* remedy available to Hopkins under the 12(2) count, though he indicated (422 F.2d, *supra* at 1131) approval of this Court's reasoning with regard to the application of the remedy provisions of 12(2). This Court hereby affirms its earlier analysis and holding that, in the factual context of this case, rescission

is the *only* remedy available to Hopkins under the first (12(2)) count. 297 F. Supp., *supra* at 1224-26.

By contrast, Hopkins, if it establishes liability under one or more of the counts other than Count I, can seemingly elect initially to pursue rescission rather than damages, and damages thereafter only if it cannot obtain rescission. *Sackett* v. *Beaman, supra* at 891; *see Myzel* v. *Fields,* 386 F.2d, *supra* at 740-49; *Rogen* v. *Ilikon Corp.,* 361 F.2d 260, 268-69 (1st Cir. 1966); *Baumel* v. *Rosen,* 293 F. Supp., *supra* at 145; III *Loss* at 1792 *et seq.;* PROSSER, *supra* at ch. 20. In some instances, the pursuit of rescission is not possible at law and can be maintained only in equity. In this case, it would seem that no law court could or would have provided, within the traditional pattern of legal remedies, the relief Hopkins seeks under Count I. *See* 1 POMEROY, EQUITY JURISPRUDENCE §§ 110, 140 and 175(a) (5th ed. 1941). For Hopkins, under Count I, cannot obtain the return of the purchase price, plus interest, without itself conveying the oil production payment to Hutton, and that conveyance requires a carefully devised, complex decree, particularly since changes in the oil production rights have taken place since Trice conveyed them to Hopkins on March 1, 1961. 297 F. Supp., *supra* at 1224-26. The solution of questions relating to both the form and the substance of the assignment documents requires either a number of rulings by the Court, or agreements negotiated by the parties under the supervision of the Court, or both. *See* 297 F. Supp., *supra* at 1235-36. The documents themselves reveal the complexities inherent in their preparation. 297 F. Supp., *supra* at 1237-58. In sum, the final decree calling for payment of money to Hopkins and conveyance of oil production rights to Hutton necessitates a "final award . . . partially in favor of both litigants," 1 POMEROY, *supra* at § 175(a). Such relief can be fashioned in equity but not in law. Further, in this

case, Hopkins is asking this Court to require Hutton, the seller's broker, not Trice, the seller, to accept the return by Hopkins of the oil production payment and to reimburse Hopkins for the purchase price plus interest. It is at least doubtful as to whether such a remedy, applying rescissional type relief against the broker of the seller, was known at law, and as to whether the grant of such relief would not have required the exercise of powers by a court sitting in equity, prior to the merger between law and equity.

Section 12(2) itself provides that a plaintiff—

> * * * may sue either *at law or in equity* in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. [Emphasis supplied.]

That section was enacted into law in 1933, prior to the merger of law and equity in 1938 under the Federal Rules of Civil Procedure. The words of 12(2) could perhaps be construed to establish in any 12(2) action concurrent jurisdiction in law and in equity. But, in the absence of any illuminating legislative history, those words would seem more likely to reflect a congressional policy to permit a suit at law, or in equity, in accordance with traditional standards governing the exercise of jurisdiction at law or in equity. *See Deckert* v. *Independent Shares Corp.*, 311 U.S. 282, 287-88 (1940).

Thus, it would appear that rescission under the 12(2) count, and seemingly also the rescissional relief which Hopkins contends is available to it under one or more of the other counts, may well lie only in equity and not in law. But even assuming that conclusion *arguendo*, it does not follow

that in this case Hutton can be denied a jury trial of the factual issues in connection with which Hopkins must prevail, before it is entitled to rescission under any count in this case, including Count I. *Ross* v. *Bernhard*, 396 U.S. 531 (1970); *Simler* v. *Conner*, 372 U.S. 221 (1963); *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Bruce* v. *Bohanon*, 436 F.2d 733 (10th Cir. 1971); *Tights, Inc.* v. *Stanley*, ____ F.2d ____ (4th Cir. April 7, 1971).[17]

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Beacon Theatres and *Dairy Queen* teach that when legal and equitable issues are presented in one case, it is "only under the most imperative circumstances, circumstances

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[17] In *Ross* v. *Bernhard*, *supra*, the Court held that the Seventh Amendment required a jury trial, if demanded, in connection with a legal claim stated in a stockholders' derivative suit. In that case, Mr. Justice White wrote (at 533):

> The Seventh Amendment preserves to litigants the right to jury trial in suits at *common* law—"not merely suits, which the common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons* v. *Bedford*, 3 Pet. 433, 447, 7 L.Ed. 732, 737 (1830). [Emphasis in original.]

Cf. Mr. Justice White's majority opinion in *Katchen* v. *Landy*, 382 U.S. 323, 336 *et seq.* (1966).

which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims". *Beacon Theatres* v. *Westover, supra* at 510-11, quoted in part in *Dairy Queen* v. *Wood, supra* at 472-73. Whether Hopkins moved quickly enough to satisfy Section 13 and/or the *Baumel* rescission test does not present circumstances more exceptional than those in *Beacon Theatres* and *Dairy Queen.*

In this case, at this time, the only remaining triable issue of fact under Count I is the Section 13 limitations issue; and the only remaining triable issue of fact in connection with Hopkins' entitlement to rescission under Counts II, III and V is whether Hopkins moved too slowly in its quest for rescission. But Hopkins' complaint leaves presently open the opportunity for Hopkins to pursue the road toward damages under all counts other than Count I, as well as to tread the avenue of rescission under at least a number of those counts. And the ultimate factual determination of whether Hopkins moved with sufficient speed to avoid the Section 13 bar to success under 12(2) and/or to meet the *Baumel* standards for rescission under 10b-3, 10b-5 and 17(a), and perhaps under one or more of the other counts, requires subsidiary factual determinations which are material and relevant in the determination of the amount of damages Hopkins is entitled to be awarded under any count other than Count I. In the light of this Court's within holding that Hutton's liability under 10b-3, 10b-5 and 17(a) is established in this case's current summary judgment posture, Hopkins has the opportunity to seek damages rather than rescission, or damages in the event rescission is held unavailable to it. It either instance, while Hopkins is entitled to a judgment for damages under those three counts, Hutton is entitled to a jury trial in connection with the determination of the *amount* of any such judgment,

and, under *Beacon Theatres* and *Dairy Queen*, is also entitled not to have facts, material and relevant in such jury trial on the issue of damages, found in any prior non-jury trial on the Section 13 and/or *Baumel* lack-of-speed questions.

At the conclusion of any non-jury trial on the Section 13 and/or the *Baumel* right-to-rescission issues, the findings of fact by this Court pursuant to Federal Civil Rule 52(a) with regard to whether Hopkins had knowledge, or should have discovered, LaPiere's misrepresentations or omissions at any given date after March 1, 1961, would be material and relevant in connection with Hopkins' proof of damages causally related to LaPiere's misrepresentations and omissions. Thus, if Hopkins should be granted a non-jury trial on either the Section 13 or the *Baumel* rescission issue, and should be held not entitled to rescission, then certain findings in that non-jury trial might deprive Hutton, in the subsequent trial on damages under any count other than Count I, of Hutton's right to have a jury write upon a clean slate in connection with all facts relating to damages other than those indisputably established in a summary judgment context prior to trial. *Cf. West* v. *Devitt*, 311 F.2d 787, 788 (8th Cir. 1963).

In *Beacon Theatres* v. *Westover, supra,* plaintiff sought declaratory relief, and also an injunction prohibiting defendant from proceeding against plaintiff under the federal antitrust laws, pending final resolution of the controversy. Defendant, *inter alia,* counterclaimed against plaintiff for damages for violation of those laws and asked for a jury trial. The grant of the equitable relief sought by plaintiff would apparently have precluded defendant from pursuing its legal claim. The Supreme Court held that the defendant was entitled to a jury trial of any factual issues common to both the plaintiff's claim and the defendant's counterclaim. In *Dairy Queen* v. *Wood, supra,* plaintiffs, alleging breach

of contract and/or trademark infringement, sought, *inter alia*, to enjoin defendant from using the plaintiffs' mark and also asked for a monetary judgment. The Supreme Court held that the defendant was entitled to a jury trial. A holding that plaintiffs were not entitled to any equitable relief might have barred plaintiffs' obtention of a judgment for a sum of money, but it is also possible that plaintiffs therein could have been held not entitled to the aid of equity and yet entitled to a monetary award. Exactly that situation exists in this case, just as it does, for example, when a plaintiff primarily seeks specific performance of a contract and only secondarily damages if specific performance is unavailable. *Beacon Theatres* and *Dairy Queen* require that in such situations there be one trial of the common fact issues, and that that trial be to a jury if a jury is demanded by either party. C. WRIGHT, LAW OF FEDERAL COURTS § 92 (2d ed. 1970).

Accordingly, Hopkins' motion to strike Hutton's demand for a jury trial under the 12(2) count is hereby denied. Hopkins is hereby required to inform this Court and Hutton within fourteen (14) days from the date of this opinion (a) whether Hopkins is primarily seeking rescission under one or more of Counts I, II, III and V and/or any other count, and, secondarily, damages under one or more of Counts II-VII, inclusive, only if Hopkins is held not entitled to rescission under any count; or (b) whether Hopkins desires to opt for damages and forego its quest for rescission; or (c) whether Hopkins asks that the pending discovery and evidentiary questions,[18] all of which apparently pertain entirely to damages, be determined by this Court before Hopkins makes the election posed by (a) and (b). After receiving Hopkins' response, and affording to Hutton the opportunity for comment thereon, this

[18] See n.5, *supra*.

Opinion, Dated April 12, 1971

Court will calendar further proceedings with regard to the possibility of the submission of special jury questions, of the order of trial, and of this Court's issuing a certification for interlocutory appeal under 18 U.S.C. § 1292(b) if either Hopkins or Hutton so requests.

It is So Ordered.

Frank A. Kaufman
United States District Judge

Appendix C

Opinion*, Dated March 29, 1972

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

THE JOHNS HOPKINS UNIVERSITY *v.* JAMES M. HUTTON, JR., ET AL.	CIVIL No. 15098

Filed: March 29, 1972

JOHN HENRY LEWIN, EDMUND P. DANDRIDGE, JR., AND VENABLE, BAETJER AND HOWARD, of Baltimore, Maryland, for Plaintiff.

JOHN A. WILSON, MICHAEL J. DESANTIS, AND SHEARMAN & STERLING, of New York, New York; and JOHN F. KING, of Baltimore, Maryland, for Defendants.

KAUFMAN, District Judge

Hopkins, following the earlier opinions of the United States Court of Appeals for the Fourth Circuit[1] and of this

* As corrected by letter of Judge Kaufman dated and filed April 4, 1972.

[1] Hopkins v. Hutton, 422 F.2d 1124 (4th Cir. 1970), in which (at 1132) the Fourth Circuit held that "germane issues of material fact preclude[d] the entry of summary judgment", under the first of seven counts of the complaint filed herein by Hopkins under § 12(2) of the Securities Act of 1933, "on the issue raised by Hutton's limitations plea," under § 13 of that Act, but that "[o]n all other issues, the district court correctly entered summary judgment for Hopkins" in connection with the said 12(2) count.

Court,[2] seeks, under three counts[2a] of its seven-count complaint, summary judgment, in the form of recission. In its last opinion, this Court, noting (at 326 F. Supp. 250, 252) that at that time, Hopkins sought summary judgment under those three counts, as to liability only, granted (at 326 F. Supp. 250, 261) summary judgment under those three counts as to liability only, and required (at 326 F. Supp. 250, 265) Hopkins to inform this Court and Hutton "(a) whether Hopkins is primarily seeking rescission under one or more of Counts I, II, III and V and/or any other count, and, secondarily, damages under one or more of Counts II-VII, inclusive, only if Hopkins is held not entitled to rescission under any count; or (b) whether Hopkins desires to opt for damages and forego its quest for rescission; or (c) whether Hopkins asks that the pending discovery and evidentiary questions, all of which apparently pertain entirely to damages, be determined by this Court before Hopkins makes the election posed by (a) and (b)." (Footnote omitted.) Hopkins responded[3] by stating that it was "primarily seeking recission under Counts II, III and V of the Complaint; secondarily, rescission under Count I; and damages under Counts II, III and V only if Hopkins is not entitled to rescission under Counts I, II, III or V."

Hopkins also filed a motion for summary judgment, as to rescission, under Counts II, III and V, and requested this Court to reconsider two of the determinations stated in its opinion filed in 326 F. Supp. 250, namely—

> I. So long as Hopkins has not waived its right to seek damages in the event it is held not entitled to rescission under Counts II, III and V, or under Count

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[2] Hopkins v. Hutton, 326 F. Supp. 250 (D. Md. 1971); 297 F. Supp. 1165 (D. Md. 1968); 40 F.R.D. 338 (D. Md. 1966) (Thomsen, C. J.).

[2a] Counts II, III and V.

[3] In a letter to this Court dated April 20, 1971.

I, Hutton is entitled to a jury trial of any triable fact issue under (a) Count I with regard to whether Hopkins has met its burden under Section 13 of the 1933 Act and/or (b) Counts II, III and V with regard to whether Hopkins is entitled to rescind rather than being limited to relief in the form of damages.

II. "Hopkins is * * * not entitled to the summary grant of relief in the form of rescission under Counts II, III or V. To gain that result, Hopkins must succeed at trial in establishing by the preponderance of the evidence that it demanded rescission 'within a reasonable time after discovery of the ground for rescission,' " *Baumel* v. *Rosen,* 412 F.2d 571, 574 (4th Cir. 1969), *cert. denied,* 396 U.S. 1037 (1970).[3a]

I.

This Court reaffirms its earlier stated conclusion that Hutton, having timely demanded a jury trial, is entitled to a jury trial in connection with *any and all triable fact issues* with regard to whether Hopkins is entitled to rescission (a) under Counts II, III and V in which Hopkins seeks relief pursuant to Section 10(b) of the Securities and Exchange Act of 1934 and Rules 10b-3 and 10b-5 promulgated thereunder, and also pursuant to Section 17(a) of the Securities Act of 1933, and/or (b) under Count I in which Hopkins seeks relief under Section 12(2) of the Securities Act of 1933, *so long as* Hopkins continues to hold in reserve, in the event Hopkins is held not entitled to rescission, its claim for damages under one or more of Counts II-VII, inclusive, of Hopkins' complaint.

[3a] 362 F. Supp. *Supra* at 262. The factual and legal background of this opinion is set forth in the Fourth Circulit's opinion and in the prior opinions of this Court, and is not repeated or summarized herein except to the extent necessary in connection with reconsideration of those two issues.

Opinion, Dated March 29, 1972

The factual context in which this issue is posed has been set forth by this Court in its last opinion and discussed therein (particularly commencing at 326 F. Supp. 250, 261 and 262, under the respective headings "Nature of Relief" and "Jury"), and need not be repeated herein. In essence, Hopkins contends that—

(1) all facts relative to its entitlement to rescission under Counts II, III and V are confined to the period between November 1, 1962 and November 1, 1963,[4] because a subjective as opposed to an objective test should be applied in measuring whether Hopkins moved with sufficient speed to permit rescission, and because this Court has already determined (at 297 F. Supp. 1165, 1224; see Judge Butzner's comment at 422 F.2d 1124, 1130) that Hopkins did not have actual knowledge of Hutton's fraud before November 1, 1962; and

(2) all facts relative to whether Hopkins has met its Section 13[5] burden under Count I are confined to the period subsequent to March 1, 1961 and preceding November 1, 1962, the latter date being one year prior to the date Hopkins filed this suit; and

(3) all facts relative to the amount of damages Hopkins is entitled to under Counts II, III and V, or any other counts,[6] are confined to the period preceding March 2, 1961, the day after Hopkins purchased the Trice production payment. Hopkins has waived any right it may have to damages in connection with any expenditures Hopkins may have made after March 1, 1961 in an effort to reduce its damages.

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[4] The date Hopkins filed the within suit.

[5] See n.1 *supra*.

[6] Assuming (a) this Court is correct in its grant of summary judgment, as to liability, under those three counts, or (b) Hopkins is otherwise successful in obtaining a verdict as to liability in this case. This Court has previously held that under Count I, Hopkins is entitled only to rescission, not to damages. 297 F. Supp. 1224, 1226. That holding was noted by Judge Butzner. 422 F.2d 1124, 1131 n.8.

Also, Hutton and Hopkins are in agreement that damages should be determined as of March 1, 1961. But Hutton contends that certain post-March 1, 1961 developments relating to the production payment Hopkins purchased on that date, are relevant and material to the determination of Hopkins' out-of-pocket damages on that date.[7] And Hutton also contends that, insofar as the Section 13 issue is concerned, Hutton is entitled to have the factfinder consider occurrences antedating March 1, 1961 as well as those which took place between March 1, 1961 and November 1, 1962 and that insofar as entitlement to rescissionary relief under the 10b-3, 10b-5 and Section 17 counts is concerned, Hutton is entitled to have the factfinder consider not only facts occurring after November 1, 1962 but also those occurring not only prior thereto but also prior to March 1, 1961. Indeed, in all three factual contexts—those relating to damages under any count, those relating to Section 13 issues under Count I, and those relating to rescission under Counts II, III and V, Hutton contends that all relevant events, whenever they occurred, should be considered.

In granting summary judgment under the 12(2) count, this Court made 126 separate findings of fact, 297 F. Supp. 1165, 1178-97. Those summary findings were apparently approved by the Fourth Circuit. 422 F.2d 1124, 1126. Thus, those factual findings, made in the partial summary judgment setting of Federal Civil Rule 56, provide the factual underpinning for any trial which is hereafter held in this case on any issue. But they do not preclude Hutton—or Hopkins—during any such trial, from introducing evidence with regard to any relevant fact, whenever it occurred, not determined prior to such trial either by this Court under Rule 56, or by stipulation between the parties, or by admission or other appropriate discovery procedure. Accordingly, if this Court should accede to

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[7] This Court has determined that the out-of-pocket standard applies in this case. 326 F. Supp. 250, 262.

Hopkins' request and should try, without a jury, any issues pertaining to Hopkins' entitlement to rescission under the 10b-3, 10b-5 and Section 17 counts or under the Section 12(2) count, this Court, as it has earlier stated at 326 F. Supp. 250, 262 and ff., might well be placed in a position in which, pursuant to the requirements of Federal Civil Rule 52(a), it would be required to make one or more findings of fact (relating to the periods prior to March 1, 1961, between March 1, 1961 and November 1, 1962, and between November 1, 1962 and November 1, 1963) which might, in the event of a subsequent jury trial on the issue of damages, be relevant and material therein. That possibility, as this Court understands the spirit, if not the letter, of *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), and its progeny, precludes this Court from first trying, non-jury, any factual issues relating to rescission under (a) Counts II, III and V, or (b) the Section 13 limitations issue under Count I. While the ultimate factual issues with regard to those rescission questions on the one hand, and the damage questions on the other hand, can perhaps be tightly compartmentalized into different periods, the underlying subsidiary factual determinations cannot be so neatly sliced and severed—at least not with any predictable certainty. They, like murder, will or, in any event, may "out"—in their case, from the isolated time periods into which Hopkins seeks to seal them in advance of trial. In that light, this Court reads *Dairy Queen* and the post-*Dairy Queen* opinions cited in 326 F. Supp. 250, 263, as teaching that Hutton is entitled to a jury trial of the rescission issues under Counts I, II, III and V so long as Hopkins holds in reserve its claim for damages under any count, since Hutton, in connection with any damage claim by Hopkins is concededly entitled to a jury trial. And this is true even if the issues which are open in this case with regard to rescission under any count, relate not to rights, but only to a specific type of equitable remedy, i.e., rescission. In that connection, this Court is cognizant of the

implication of Mr. Justice White's quotation from *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830). In *Ross* v. *Bernhard,* 396 U. S. 531, 533 (1970),[8] that a jury trial is available "not merely [in] suits, which the common law recognized * * * but [also in] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . ." (Emphasis supplied by Mr. Justice White in *Ross* v. *Bernhard, supra.*) In this case, if this Court is correct in its grant of summary judgment as to liability under Counts II, III and V, and its holding that in the factual context of this Case rescission is the only remedy available under Count I, the only possible triable fact issues left open in connection with rescission as opposed to damages are related to the *remedy* of rescission, which, *in this case,* for reasons set forth in 326 F. Supp. 250, this Court believes is available only in equity. Perhaps, even so, *Ross* v. *Bernhard* entitles Hutton to a jury trial of the issues relating to rescission under Counts I, II, III and/or V, but, on balance, this Court would not think so. Nevertheless, because of the more than minimal possibility that there are common facts relevant and material to the factual determinations involved in connection with the damage questions on the one hand, and the rescission questions on the other hand, this Court, applying its understanding of *Dairy Queen* and its progeny, concludes that Hutton is entitled to a jury trial of the rescission issues if they are tried before or at the same time as the damage issues. But for reasons stated under II, *infra,* this Court also concludes that upon the current state of the record in this case and the undisputed facts disclosed by it, Hopkins is entitled to the summary grant of rescissionary relief under Counts II, III and V, and that Hutton, having failed within the context of Federal Civil Rule 56 to controvert those facts, is not entitled to wait

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[8] Quoted more fully at 326 F. Supp. 250, 263 n.17.

until trial by jury to produce evidence in connection therewith.

II.

In its opinion at 326 F. Supp. 250, this Court assumed, after consideration of the statements made by Judge Bryan in *Baumel* v. *Rosen*, 412 F.2d 571 (4th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970), that Judge Bryan's holding in that case required Hopkins to shoulder substantially the same factual burden in its quest for rescission under the 10b-3, 10b-5 and Section 17 counts as is imposed on it by Section 13 under the Section 12(2) count. At the time this Court so concluded, Hopkins had moved under the 10b and 17 counts for summary judgment only as to liability. As a Monday morning quarterback, this Court would, if it could, turn the clock back several years to the date before it rendered any opinion in this case, and require Hopkins to file at one time all summary judgment motions under all counts. Further, this Court suspects that Hopkins, given such a hindsight chance, would voluntarily so do. But, against the backdrop of events as they have in fact occurred[9] and in the light of the present availability of additional affidavits and discovery supplied and undertaken and filed herein by both parties since this Court filed its last opinion on April 12, 1971 and the lengthy and indeed exhaustive briefs and oral presentations submitted by counsel on both sides since that date, this Court concludes that the burden imposed on a plaintiff like Hopkins who, if this Court's holding at 326 F. Supp. 250 is correct, is entitled to relief as to liability under the counts laid in 10b-3, 10b-5 and Section 17 contexts and who seeks to obtain

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[9] The progress of this case, since the Fourth Circuit's remand in 422 F.2d 1124, is detailed not only in 326 F. Supp. 250, but also in the correspondence among Court and counsel and memoranda filed by counsel, all of which are included in the official court file. So are the transcripts of all motion hearings which have been held in open court on the record.

that relief in the form of rescission, is different with regard to establishing entitlement to that form of relief, from that imposed on such a plaintiff in connection with relief sought under Section 12(2) and the latter's related Section 13 requirement.

Section 12(2) places the burden of *dis*proving his own *scienter* upon the defendant, 297 F. Supp. 1165, 1219, but requires the plaintiff affirmatively to prove, pursuant to Section 13, that plaintiff has instituted its suit within three years after the sale of the security and also "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence * * *." (Section 13 of the 1933 Act, 15 U.S.C. § 77). By contrast, Section 10(b) of the 1934 Act (and Rules 10b-3 and 10b-5 thereunder) and Section 17 of the 1933 Act, place the burden of proving the *scienter* of the defendant upon the plaintiff. And the applicable case law teaches that in this suit instituted in 1963 in the District of Maryland the limitations period under the counts stated under Section 10(b) of the 1934 Act, in the absence of any specific limitations period having been imposed by the federal Congress with regard to 10(b) actions in the 1934 Act or any other federal statute, is the three-year limitations period applicable in Maryland prior to 1968 in connection with the most closely related Maryland tort actions. *See Batchelor* v. *Legg & Co.*, 52 F.R.D. 553, 558 (D. Md. 1971). The same, in the absence of any provision in the 1933 Act or in any other federal statute, would appear true with regard to the Section 17 count. *Sackett* v. *Beaman*, 399 F.2d 884, 890 (9th Cir. 1968); *Turner* v. *Lundquist*, 377 F.2d 44, 46 (9th Cir. 1967); *Saylor* v. *Lindsley*, 302 F. Supp. 1174, 1179 (S.D.N.Y. 1969).

The Fourth Circuit has already held, with regard to the three-year requirement of Section 13, that this case was brought by Hopkins within such three-year limitations

period. 422 F.2d 1124, 1130. That holding is equally applicable to the 10b-3, 10b-5 and Section 17 counts. Thus, there is no question of limitations constituting a bar with regard to any of those three counts. Rather, there remains for determination herein only the question of whether Hopkins is entitled to relief in the form of rescission under one or more or all of those three counts.

Hutton, relying heavily upon *Baumel* v. *Rosen, supra,* certain of the positions urged and statements made in Friedman, *Delay as a Bar to Rescission,* 26 Cornell L. Q. 426 (1941)—an article cited by Judge Bryan in *Baumel*—and this Court's expressions of view in 326 F. Supp. 250, contends that a plaintiff, in order to be entitled to rescind in a 10(b) or 17 suit, has the burden of affirmatively alleging and proving that (1) it has taken all steps which a reasonable man should have taken to discover the defendant's fraud and that (2) it has demanded rescission promptly after it knew or should have known thereof. Since the Fourth Circuit has held, on the basis of the record before it in 1970, with regard to Hopkins' 12(2) count that there existed a triable issue of fact as to whether Hopkins instituted this suit within the one-year limitations period in accordance with the burdens and standards of Section 13, Hutton contends that *if* those same burdens and objective standards must be met by Hopkins to entitle it to rescissionary relief under any of the other counts, there exists in this case at this time a similar triable issue of fact as to whether Hopkins had or should have had knowledge of Hutton's wrongdoing at a time sufficiently in advance of Hopkins' tender of the security on August 6, 1963 to disentitle it to rescind. In connection with Section 13, the key date is one year before the day suit herein was filed, namely, since this suit was filed on November 1, 1963, November 1, 1962, and the relevant period for examination is the period prior to that latter date. In connection with rescission under the 10(b) and 17 counts, the key date is the date suit was instituted, i.e., November 1, 1963, and the rel-

evant period occurs prior thereto. Thus, if there is a triable fact issue with regard to the former, *a fortiari,* there is one with regard to the latter unless (a) the applicable standards or burdens differ, and/or (b) the record currently before this Court is not the same as the record before this Court in 1968 and the Fourth Circuit in 1970.

The starting point of the analysis of those applicable burdens and standards is *Baumel* v. *Rosen, supra.* The facts of that case reveal that in 1957, shortly after Gulf American Land Company (hereinafter referred to as Gulf American or Gulf) was incorporated as a Florida corporation and began to deal in real estate and related businesses in Florida and elsewhere, the two Rosen brothers each purchased 26%, or a total of 52%, of the stock of that corporation and made loans to it. Also, in 1957, the company sold stock to others, including Baumel and Weiner (the plaintiffs-appellees in *Baumel*). In 1959, the Rosens, while in control and while exercising direction of the company, bought the stock of Baumel and Weiner. Judge Bryan noted (at 573) that the court below had "found that the purchases from Baumel and Weiner, as well as from others, were procured through affirmative misrepresentations of the financial condition of the company, and under nondisclosure of material incidents in the corporate operations," and had correctly held the Rosens liable. However, Judge Bryan, speaking for a unanimous three-judge panel, reversed the grant of rescission by the district court. In so reversing, Judge Bryan summarized the relevant facts as follows (at 574):

> On August 16, 1962 Baumel and Weiner renounced their sales to the Rosens by filing these actions. The complaint in each instance asked for rescission, and for restitution by delivery to the plaintiffs of the current equivalent in kind of the 500 shares purchased by the defendants in 1959. In the interim, the Gulf stock was split on March 1, 1961 at the rate of 34.6 shares for

1, giving 17,300 shares for each 500-unit. Another split occurred on March 19, 1962, at the rate of 4 to 1. At the time of suit each initial unit had thus increased to 69,200 shares.[10]

* * * Plaintiffs sold their stock [to the Rosens] in August 1959. Baumel states that at the end of the month or in early September he believed he had been "taken", i.e., that the price he received was far less than the then value of the securities. Weiner testifies that at Thanksgiving or Christmas 1959 he had been told by a friend that Gulf "had plans to go public and that the stock was worth quite a bit of money more than I had received for it".

Nevertheless, neither plaintiff renounced for three years—in August 1962 when they instituted these actions. Rescission is a radical move, and the law exacts the election of that course to be asserted without wait. The demand is that advice of the determination be given within a reasonable time after discovery of the ground for rescission.

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[10] In a brief herein, Hopkins, relying upon the facts jointly stated by both sides during the appeal in *Baumel*, has summarized the market value fluctuations of Gulf American stock in 1961 and 1962 as follows:

"Shortly before the March 1961 public offering, Gulf American split its common stock 34.6 for 1 and shortly before the 1962 public offering the stock was further split 4 for 1. Thus, the "unit" of 500 shares of stock originally acquired by Baumel was by July, 1962 represented by 69,200 shares. Adjusting all prices to reflect both the first and the second stock splits, Baumel in 1957 paid 1.451 cents a share for the stock; in August, 1959 his stock was sold by him to the Rosens for about 14½ cents a share. All other sales of Gulf American stock made during the spring or the summer of 1959 were at prices of 14½ cents a share *or less*. A year and a half later, on March 8, 1961, the offering price was $1¼ a share. In March, 1961, the high was 2¼ and its low was 1 11/16. In June, 1961, the stock was listed on the American Stock Exchange. It reached 12 19/32 in November, 1961, dropped to 7 25/32 in December, 1961, attained a peak of 15¾ in March, 1962, and went down to 7⅞ in July, 1962, a month before suit was filed (Joint App. in *Baumel* case p. 697)."

> This principle is stringently administered. Reasonable time is inceptive from the receipt by the rescinder of word putting him on notice. It is then incumbent upon him to pick up the scent and nose to the source. See Friedman, Delay As a Bar to Rescission, 26 Cornell Law Quarterly 426, 432, text at *footnote 31* and authorities cited therein (April 1941). If the quest confirms the suspicion, then he must make decision with reasonable dispatch. Failing this, entitlement to rescission disappears.
>
> Here, no such vigor was exhibited. Indeed, although plaintiffs are not chargeable with complete awareness of the knavery earlier than March 1961—when the Gulf stock went public, and more than 14 months after they had wind of the malodor—they pondered another 18 months before disclaiming the sale. [Emphasis supplied.]

Footnote 31 in the Friedman article contains citations in support of the following statement made by the author in the text (at p. 432):

> Full and complete knowledge of an alleged fraud or breach of contract is not essential to impose upon a would-be rescinder the necessity of acting promptly and diligently if he wishes to assert a rescission. It is enough that he has such *notice of the facts* as would *impel* a reasonable man in his position to make inquiry. [Emphasis supplied.]

In *Baumel*, the would-be rescinders, with knowledge of the fraud, delayed for a lengthy period in seeking rescission and thus, during that period, speculated while the value of the stock fluctuated greatly, and "pondered" eighteen (18) months, using Judge Bryan's word (at 574), whether to disclaim the sale. In the within case, the record contains no evidence of—and Hutton has not even affirmatively sug-

gested—any speculation by Hopkins or any fluctuation in the market price of the production payment Hopkins purchased from Trice on March 1, 1961 or of any reasonable anticipation by Hopkins in advance of, or during, that period that any such fluctuation would occur.[11] In *Baumel,* the purchasers delayed in tendering back and in seeking rescission long after they knew of the fraud. In this case, the *current* state of the record discloses no such delay by Hopkins.

In its earlier opinions, at 297 F. Supp. 1165, 1224 n.33, and 326 F. Supp. 250, 261, this Court, lacking any information as to any earlier tender date, proceeded on the assumption that Hopkins may not have tendered back to Hutton the oil production payment, purchased by Hopkins on March 1, 1961, prior to November 1, 1963. As an exhibit to an affidavit of Henry Baker, Treasurer and Financial Vice President of Hopkins during the entire 1960-1963 period, Hopkins has filed, since this Court rendered its opinion in 326 F. Supp. 250, a copy of a draft of a five-count bill of complaint, alleging substantially the facts set forth by Hopkins in the complaint filed herein on November 1, 1963. It is undisputed that a copy of that draft was handed, in the presence of Baker and Patterson, Hopkins' Assistant Treasurer,

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[11] Hopkins has filed in this case an affidavit of J. J. Arps, a petroleum engineer employed by Hopkins to make a study of the March 1, 1961 production payment Hopkins purchased from Trice. Arps rendered his report to Hopkins in 1967. Arps, who states that he was engaged in the period from December 1, 1962 to August, 1963 in evaluating oil and gas properties in the United States and is qualified as an expert to form an opinion with regard to market value fluctuations of such production payments during that period of time, concluded that no pronounced changes or fluctuations in the market value of the March 1, 1961 production payment took place in that period or could reasonably have been anticipated or forecast to occur during that period. Hutton challenges the Arps affidavit as speculative and as, in any event, not entitled to weight in a Rule 56 context. This Court, in the current context of this case and in reaching its conclusion herein, disregards and affords no weight to the Arps affidavit.

by Dandridge, Hopkins' counsel, to two of Hutton's partners, its then oil and gas department manager and its counsel, DeSantis, in Hutton's offices in New York City on August 6, 1963. While the accounts of that meeting set forth in opposing affidavits, also filed since this Court's last opinion, disclose some disagreement as to what was said during that meeting, it is not disputed by Hutton that Hopkins' representatives handed to Hutton's representatives at that meeting the aforesaid draft of the bill of complaint, or that in that draft Hopkins, at the end of the first count, alleges "acts and omissions" under Section 12(2) of the '33 Act and alleges that it "has heretofore tendered to Defendants who refused said tender," the oil production payment Hopkins purchased on March 1, 1961, and recites that "[p]laintiff hereby renews said tender * * *."

The following facts, *inter alia,* have also been developed since this Court filed its last opinion and are also undisputed:[12]

(1) The aforesaid August 6, 1963 meeting resulted from Baker's request for such a meeting during a telephone call Baker initiated to Iglehart, a former Hutton partner, on July 26, 1963.

(2) The day after the August 6, 1963 meeting Dandridge addressed a letter to DeSantis to which the latter responded on August 8, 1963, stating therein, *inter alia,* that he (DeSantis) would return from vacation on September 10, 1963. After correspondence between Dandridge and one of DeSantis' associates while DeSantis was on vacation, De-

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[12] This Court, as it similarly did in making all findings of fact in 297 F. Supp. 1165, disregards all facts affied by Baker in his May 3, 1971 affidavit which depend in any way upon Baker's credibility, unless those facts have been agreed to by or on behalf of Hutton in affidavits or other documents filed herein by Hutton.

Santis, on September 16, 1963, wrote to Dandridge and the latter responded as follows on September 19, 1963:

> I do not wish to press you unduly but, as you know, I feel that if we are to file suit we should do so before October 15; therefore, if we are to have any further conversations, they should take place within the very near future.

(3) On September 20, 1963, DeSantis, in a letter to Dandridge (acknowledging receipt of a November 1, 1962 report of William Bednar, employed as early as 1960 by Bankers Trust as a consultant in connection with Trice's oil production payments, 297 F. Supp. 1165, 1181, Finding of Fact 13), wrote:

> I appreciate the urgency expressed by you in the last paragraph of your letter, and we shall make, and are making, every effort to comply with your request. However, in view of the *complexity of the matter to be investigated* and the substantial amount involved, it may be impossible for us to come to a decision before October 15, 1963. In such event, we may have to request a little more time beyond that date to reach a decision. [Emphasis supplied.]

(4) On September 24, 1963, Dandridge replied:

> As I believe you know, we are concerned with the passage of time only in two respects. In the first place I am afraid that the time may arrive when the District Court in Tyler[13] may require that we disclose the names of all persons against whom we wish to retain claims after confirmation of a Plan of Reorganization. We will not make any such disclosure unless we are forced to, but of course I cannot give any assurances as to when the Court might request this of us. In the

[13] In connection with Trice's bankruptcy.

second place I am concerned that if we do not file the suit shortly after the middle of October, we might encounter limitations problems. If we are to withhold filing of a suit more than a day or two after October 15, I would want an agreement from your clients that no defense will be raised based on failure to file the Complaint by October 15.

(5) On October 10, 1963, more than 150 days after Hutton's work product period began,[14] DeSantis wrote to Dandridge, stating counsel's opinion that Hutton had no liability to Hopkins and rejecting, on Hutton's behalf, Hopkins' claim.

Thus, the record discloses that Hopkins was not guilty of delay after July 26, 1963. Nor did Hopkins, as this Court, at 297 F. Supp. 1165, 1220-22, with the seeming approval of the Fourth Circuit, 422 F.2d 1124, 1130, has previously found, have any actual knowledge of defendants' wrongdoing until after November 1, 1962. Thus, it is necessary to examine the period between November 1, 1962 and July 26, 1963 and prior thereto to determine what Hopkins learned on its own, or from Hutton, and the period prior to July 26, 1963 and also prior to November 1, 1962 to ascertain what Hopkins, with the exercise of reasonable diligence, should have learned.

(6) On November 10, 1962, Bednar suggested in a preliminary report to Hopkins that the estimates of the reserves might have been either erroneous or not as represented to Hopkins before it made its investment. There is no indication in the voluminous record in this case that prior thereto Hopkins (a) had any earlier subjective knowledge that the reserves might be inadequate to protect Hopkins' investment, or (b) shut its eyes to any such information or to warnings flashed in front of it.

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[14] See n.17, *infra*.

(7) Again, in December, 1962, Bednar expressed to Hopkins a further preliminary pessimistic view. And in December, 1962, and perhaps as early as November 28, 1962, Baker discussed with Dandridge the possibility of Hutton's liability to Hopkins. In January, 1963, Bednar gave information to Hopkins which led Baker and Dandridge to note at that time that the DeGoyler and MacNaughton (D and M) estimates differed substantially from the estimates represented in the February 3, 1961 brochure as the estimates of D and M. (See 297 F. Supp. 1165, 1190-91; Findings of Fact Nos. 64 and 65). However, in January, 1963, Hopkins had before it a lot of work before it could discover who, if anyone, had done something wrong to Hopkins. By contrast, Baumel and Weiner knew, when they discovered they had been taken, who had wronged them.

(8) In February, 1963, Hopkins sent Bednar's report to Brown. Hopkins admits that at a meeting with Brown on March 18, 1963, Brown informed Hopkins that LaPiere, an old friend of Brown, had employed Brown at Hutton's expense to make his 1961 study for Hutton and Trice and not for Hopkins, and that he (Brown) had not studied the reports of D and M or of any of the other engineers. Thus, Hopkins, by mid-March, 1963, not only was the recipient of Bednar's pessimism with regard to the reserves and of the discrepancies with regard to the D and M estimates, but also knew that Brown had not acted in 1961 as Hopkins' independent expert consultant. Approximately one hundred and thirty days later, Baker, on July 26, 1963, asked for the meeting which took place on August 6, 1963, and at which Dandridge handed the draft complaint to Hutton's representatives. Hopkins contends that it required that period of time for it and its counsel to examine documents and records, interview witnesses, research legal authorities, determine the likelihood of loss, and attend to the problems caused by Trice's reorganization. That contention would appear completely reasonable.

(9) Iglehart, a former Hutton partner, has stated that in a telephone conversation on May 29, 1963, he told Baker that "Hutton wanted to do whatever was right" and that Hutton did not want to keep any commission it had earned in the transaction.[15] Iglehart has also affied that when he talked to Baker on May 29, 1963 he did not "have any information or knowledge that LaPiere was guilty of any misconduct in his relations with Hutton or with Trice."[16]

(10) William Hutton has stated that in May, 1963, his company's information concerning purported payments by Trice to LaPiere was too indefinite and too incomplete for Hutton to pass it on to Hopkins, that Hutton continued to explore into the Trice situation in the May-July, 1963 period; that when Hutton's counsel, DeSantis, interviewed LaPiere on July 9, 1963, the latter denied any impropriety in his relations with Trice (DeSantis noted, however, that LaPiere was "greatly embarrassed" and "very much disturbed" by the information with which DeSantis confronted him, including details of purchases made by Trice for LaPiere and commissions paid by Trice to LaPiere);[17] and that, as of July, 1963, Hutton did not have "any *concrete evidence* to present to Hopkins that LaPiere had been secretly in the pay of Trice during the period of Hopkins' negotiations for the purchase of the production payment."[18] (Emphasis in original.)

A review of the massive record in this case, compiled since 1963 and comprising considerably in excess of 7500

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[15] Iglehart's June 4, 1971 affidavit, p. 2.

[16] Iglehart's June 4, 1971 affidavit, p. 2.

[17] DeSantis' memorandum of his interview with LaPiere on July 9, 1963, furnished to Hopkins as part of Hopkins' discovery in this case. Hutton's work product period was determined by this Court (Chief Judge Thomson) to begin as of May 9, 1963; and that of Hopkins as of December 14, 1962.

[18] William Hutton's affidavit, p. 5, ¶ 10, filed herein on June 11, 1971.

pages of testimony and factual documents, reveals the accuracy of DeSantis' use in September, 1963 of the word "complexity." The fact that Hopkins needed from November 1, 1962 until July 26, 1963 to investigate, to sift and to determine whether to level a very serious charge against such a highly reputable financial firm as Hutton, particularly in view of the close associations of certain of Hutton partners and representatives, on the one hand, and some of Hopkins officers and representives, on the other hand, in no way gives rise to any inference of (a) subjective knowledge by Hopkins of Hutton's wrongdoing at any date substantially before July, 1963, or (b) Hopkins' closing of its eyes to any such knowledge, or (c) any delay by Hopkins, purposeful or otherwise; nor does it provide any basis for a factual determination that on objective standards, Hopkins should have discovered Hutton's wrongdoing before July 26, 1963. Rather, the record discloses only that Hopkins was careful not to claim against Hutton until after adequate investigation.

In the Fourth Circuit's opinion herein, 422 F.2d 1124, 1130-31, Judge Butzner observed:

> Before November 1, 1962 Hopkins learned that Trice was in financial trouble, that some of its checks were returned for insufficient funds, that Trice's report of its financial condition could not be reconciled with Dun & Bradstreet's, that the return from another production payment was behind schedule, that some of the wells underlying Hopkins' payment were not producing or were underproducing, and that an involuntary petition for bankruptcy had been filed against Trice.
>
> To be sure, Hopkins and its advisers did not stand idly by as this bad news rolled in. They conducted investigations that led them to believe that Trice's troubles, and Hopkins' own worries, were caused by

factors other than deficiencies in the estimates of the future net revenue. * * *

Perhaps, as Hopkins argues, Trice's shaky financial condition would not alert an investor to fraud. But surely the failure of some wells to produce as scheduled coupled with Trice's lack of candor about its finances *might cause a reasonably diligent investor to probe the data upon which he based his purchase.* Had Hopkins compared all the experts' reports, which it had a right to do under the terms of the production payment, it could readily have discovered the untrue statements and the omissions about which it now complains. [Emphasis supplied.]

Judge Butzner so wrote in the light of the record then existing in this case and in the context of applying the requirements of Section 13. As of the date of this writing, the record, as has been indicated *supra,* has been substantially amplified. In addition, as above indicated, the duty to inspect—to ferret out if you will—which Judge Butzner discusses in connection with Section 13 would not appear to impose upon Hopkins in a 10(b) or 17 action the duty to do any more than it did during the first seven months of 1963 and prior thereto. Whether Hopkins can be said, in the light of the additions to the record since Judge Butzner wrote in 422 F.2d 1124, to have satisfied the standards of Section 13 and to be entitled to summary rescissionary relief under 12(2) poses an issue not presently before this Court though in this opinion this Court assumes, *arguendo,* that the answer to that question is in the negative. Herein, the inquiry narrows to the determination and the recognition of those factors which qualify or disqualify a person to or from entitlement to rescission in a 10(b) or 17 action. What must such a person, who has been wronged, do or not do if he desires to rescind, both before and when he files such a suit? To begin with, he must not sit still and delay filing his suit after he has

knowledge of the wrongdoing, particularly if, by so doing, he desires to engage in, or in fact engages in, speculation.[18a] Friedman, in his article, wrote (at 451):

> An attempt at speculation—that is, the retention of the fruits of the bargain, or the continued recognition of a contract as subsisting, done for a time with the purpose of seeing whether affirmance or disaffirmance would be more profitable—might properly be characterized as an actual ratification of the contract. The authorities uniformly condemn such speculation by a would-be rescinder. [Footnote omitted.]

Earlier in that article, Friedman (at 432-33), after quoting BLACK, RESCISSION AND CANCELLATION § 540 (2d ed. 1929) as stating:

> . . . it is held that the purchaser of personal property is *bound,* within a reasonably short time after its delivery to him, to *make* a sufficient examination, *inspection,* or test of it to enable him to determine whether or not he has cause to complain of misrepresentations in regard to it, or of a deficiency in quantity or quality, or failure to correspond with samples or with a warranty" (emphasis supplied),

immediately hastened (at 433-34) to warn:

> This is an erroneous statement of the law, imposing a far stricter duty upon a rescinding party than is imposed by the cases. The cases cited in support of the statement stand only for the well-settled propositions that: (1) the rescinding party may not shut his eyes to the obvious facts showing misrepresentation or breach of contract, but will be held to have acquired that knowledge which would have been acquired through ordinary and reasonable diligence . . . .

[18a] There is no evidence in this case of any speculation by Hopkins. See the discussion at [pp. C-13—C-14], *supra.*

> But any suggestion that a defrauded party . . . has a *duty* to ascertain the facts has been repudiated by the authorities. It is only where notice of the facts has been brought to a would-be rescinder that he must act promptly in declaring his rescission. [Emphasis in original; footnotes omitted.]

The case law contains many illustrations of delaying or speculative tactics which have resulted in wronged plaintiffs being held not qualified to obtain rescissionary relief. Among such cases are three cited and discussed by Judge Bryan in *Baumel* (at 474-75), namely, *McLean* v. *Clapp*, 114 U.S. 429 (1891); *Twin-Lick Oil Co.* v. *Marbury*, 91 U.S. 587 (1875); and dictum in *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527 (10th Cir. 1962). In *McLean*, the defendant, by affirmative plea, successfully raised delay as a bar to rescission by the plaintiff—sought by the plaintiff after the latter had more than eleven years of knowledge of alleged fraud in connection with a mortgage foreclosure. In *Twin-Lick*, in which the defendant's sale as trustee under a deed of trust covering realty, given as security for a loan, was attacked as a violation of defendant's fiduciary obligation, the plaintiff waited four years to state the challenge—and was held not entitled to rescind. In both *McLean* and *Twin-Lick*, the fluctuating value of the property involved was stressed, as it was by Judge Bryan in *Baumel*. Indeed, the quotations (at 574) from *McLean* and *Twin-Lick*, selected by Judge Bryan, include the words "speculative" from *McLean* and "fluctuating" from *Twin-Lick*. It is also to be noted that the cases cited in *Twin-Lick* disclose lengthy delay.

Estate Counseling, the third case relied upon by Judge Bryan in *Baumel*, contains strong dictum with regard to the need to act promptly to rescind when the transaction is one of "a speculative nature"—words which Judge Bryan also quoted in *Baumel*.

Nothing in *Baumel,* or in the cases it cites, or indeed in any of the cases cited or discussed in Friedman's article, is in any way inconsistent with the position set forth in *Restatement of Restitution* § 64 (1st ed. 1937):

> § 64. Delay in Avoidance of Transaction.
>
> An unreasonable delay in manifesting an avoidance of a transaction after the *acquisition of knowledge* of the facts terminates the power of rescission for fraud or mistake, and the consequent right to restitution, if the interests of the transferee or of a third person are harmed or were likely to be harmed by such delay. [Emphasis supplied.]

But it is to be particularly noted that Comment (b) to that section states:

> *A person who has been defrauded is under no duty of diligence to ascertain the facts. He is not required to investigate statements of facts coming from unauthoritative sources.* * * * [Emphasis supplied.]

Comment (c), with regard to the "Delay after Knowledge of Facts," states:

> It is not possible to make a useful statement of exact rules which determine the situations in which promptness is required and the time within which an election must be made when it must be made promptly. The following considerations, however, are important. The degree of culpability of the transferee, if any, is of prime importance; less delay will be permitted against an innocent transferee than against one guilty of fraud or duress. Ordinarily, there is injustice to the transferee in postponing election . . . where delay would give the transferor an unfair chance to profit without a corresponding risk of loss if he were to

> retain his power of election, as where the *transaction was speculative* . . . . [Emphasis supplied.] [19]

Comment (a) to Section 483 states, *inter alia,* that "the injured party . . . cannot lie by and delay choosing whether avoidance or affirmance will be more profitable, especially if the contract relates to a speculative transaction." And Illustration 1 to that section states:

> A fraudulently induces B to enter into a contract in January by which A agrees to sell and B to buy one hundred shares of the C corporation on May 1st. B soon discovers the fraud but concludes to wait and see whether the market price of the shares rises or falls. In April he manifests an intention to avoid the transaction. The manifestation is inoperative, although A has not changed his position and the welfare of third persons has not been prejudiced.

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[19] *See also Restatement of Contracts* § 483 (1932) which provides:

§ 483. Loss of Power of Avoidance by Failure to Notify the Other Party.

(1) The power of avoidance for fraud or misrepresentation is lost if after acquiring knowledge thereof the injured party unreasonably delays manifesting to the other party his intention to avoid the transaction.

(2) In determining the unreasonableness of delay the following circumstances are influential:

(a) the speculative character of the contract whereby prolongation of the power to affirm or to avoid would give an advantage to the injured party or increase the loss of the other party;

(b) the likelihood that the party guilty of the fraud or misrepresentation will materially change his position, or the welfare of a third person be unjustly prejudiced by delay;

(c) the fact that change of position by the party guilty of the fraud or misrepresentation, or prejudice to a third person, has in fact occurred during a period of delay in manifestation of intention.

Opinion, Dated March 29, 1972

In *Pence* v. *Langdon,* 99 U.S. 578, 581 (1878), in which rescission of the purchase of mine stock was successfully sought, the Supreme Court, in rejecting the defenses of delay, waiver and acquiescence by the seller, said:

> Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot *waive* or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be *knowledge* of *facts* which will enable the party to take effectual action. *Nothing short of this will do.* But he may not *wilfully* shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind and must seek compensation in damages. But the *wrong-doer cannot* make *extreme vigilance* and *promptitude* conditions of rescissions. It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive.
>
> *The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.* [Emphasis supplied.]

See, to the same general effect, *Libby* v. *L. J. Corporation,* 247 F.2d 78, 82 (D.C. Cir. 1957) (Burger, J.); *Johnson* v. *Mansfield Hardwood Lumber Co.,* 159 F. Supp. 104, 105 (W.D. La. 1958), *aff'd,* 263 F.2d 748 (5th Cir.); *cert. denied,*

361 U.S. 885 (1959);[20] *McIver* v. *Norman,* 213 P.2d 1944 (Ore. 1949). *See also Royal Air Properties, Inc.* v. *Smith,* 312 F.2d 210 (9th Cir. 1962), 333 F.2d 568 (9th Cir. 1964), in which the Ninth Circuit stressed "the mental attitude of the actor" (333 F.2d *supra* at 571).

The language in *Pence* v. *Langdon* and in the *Restatement of Restitution* lends support to the view that a would-be rescinder need not affirmatively set out to discover and that he need only keep his eyes wide open and exercise reasonable alertness. There are, however, a number of cases, some cited by Friedman at p. 432, n.31, which do perhaps impose an affirmative duty of inspection, in the context of an objective, reasonable-man standard, upon the would-be rescinder. *See, e.g., Bynum* v. *Southern Building & Loan Assn.,* 137 So. 21, 23 (Sup. Ct. of Ala. 1931), stating: "Our cases are to the effect that one electing to rescind a contract for fraud must exercise the right within a reasonable time, that is, with due promptitude from the time the fraud was discovered, or ought to have been discovered"; and *Lasby* v. *Burgess,* 289 Pac. 1028, 1032 (Sup. Ct. of Mon. 1930); "If the information was such as to put him [the plaintiff] on inquiry, which, if pursued, would result in knowledge, it is sufficient, although coming from a third person. Black on Rescission & Cancellation (2d Ed.) § 539 * * *." Nevertheless, in this Court's opinion, while the test may, at least to some degree, include elements which are objective as well as subjective, and may place some affirmative duty to ferret

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[20] In Johnson *v.* Mansfield Hardwood Lumber Co., *supra,* the District Court wrote (at 125):

> Plaintiffs' counsel, as responsible, ethical members of the Bar, surely could not have been expected to file a suit based on fraud before they had obtained sufficient evidence in corroboration of their clients' version of the facts. This took time, but not too much time at that, for they had uncovered enough facts to justify their action herein, and filed the suit, *within less than a year from the first notice* plaintiffs received as to their having been defrauded. [Emphasis supplied.]

out the wrongdoing and the wrongdoer upon the person who has himself been wronged, the view which seemingly controls in a case of this kind is the one set forth in *Pence* v. *Langdon,* in the *Restatement of Restitution,* and in Friedman, at 433-34 where the latter warned against imposing an overly strict duty of inspection upon the would-be rescinder.[20a]

The application of those standards to Hopkins' conduct in this case must be made not only with full regard of the burdens Hopkins bears in a summary judgment setting, but also of the differences between the burden of proof which Hopkins bears in a 10(b) or 17 action as opposed to a 12(2)-13 proceeding. The extent of Hopkins' duty to inspect and to ferret out the wrongdoing and the wrongdoer, and the speed with which the same should have been accomplished by Hopkins is quite different under 12(2)-13 than under 10(b) or 17.[21] Section 13 specifically imposes upon a plaintiff the burden of proving that the plaintiff neither knew nor should have discovered the wrongdoing by the exercise of due diligence. By way of direct contrast, in a common law (or 10(b), or 17) setting, that burden is, as *Pence* v. *Langdon, supra,* specifically states at 582, upon the defendant.[22] To the same effect with regard to the burden of proof being upon a defendant such as Hutton to show delay by a plaintiff such as Hopkins, *see Reliance Life Ins. Co.* v. *Burgess,* 112 F.2d 234, 237-38 (8th Cir. 1940); BLACK, RESCISSION AND CANCELLATION, *supra* at 1481, 1621-22.[23] To the contrary, at

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[20a] Quoted at pp. [C-22—C-23] *supra.*

[21] See the discussion *supra* beginning at pp. [C-21—C-22].

[22] See the *Pence* v. *Langdon* quotation, *supra* at p. [C-26].

[23] Black therein wrote:

> [I]f a prima facie right to rescind is made out, then the burden of proving acquiescence, waiver, or election to affirm is on the party alleging it. But it is said that where an original transaction is infected with fraud, a confirmation of it would be so inconsistent with justice, and so likely to be accompanied by imposition, that the courts will watch it with the utmost strictness and not

first blush, is Friedman who in his article (at 452 n.117 and n.118) cites ten state court cases to support his conclusion (at 428-29) that "in rescission actions, it is incumbent upon the plaintiff to prove that he acted promptly in seeking his rescission."[24] In some of those cases, special statutory requirements may well explain holdings or dicta. In others, the period of delay was lengthy, thus seemingly establishing a prima facie case of delay by the plaintiff which the latter did not or could not rebut. But, in any event, Friedman

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> allow it to stand but on the clearest evidence of a solemn and deliberate act. [p. 1481; footnotes omitted]
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> * * *
>
> * * * But if the means of information were not accessible to the complainant, and he justifiably relied on what the defendant told him, the latter must prove knowledge on the part of the complainant, if he resists a suit for rescission on that ground. So, if the defendant in an action of this kind sets up the defense that the complainant had knowledge of the facts which would have entitled him to rescind, but nevertheless acquiesced in the contract or ratified it, the burden is not on the complainant to show his ignorance of such facts, but on the defendant to prove his knowledge of them. Laches of the complainant, debarring him from relief to which he otherwise would be entitled, is likewise a defense which casts the burden of proof on the defendant, except in cases where an unreasonable delay appears on the face of the pleadings, when the burden falls on the plaintiff to show the time when he discovered the fraud or other ground of rescission, and also circumstances which explain or excuse his delay in bringing suit. [pp. 1621-22: footnotes omitted]

[24] Friedman contrasts that duty by plaintiff with the defendant's burden in connection with the affirmative defense of laches. *See also* Friedman's discussion at 431: "[P]rompt action after knowledge or notice of the facts * * * is an element of the plaintiff's cause of action." However, Friedman (at 453) does note that some authorities hold that "loss of the power of rescission by delay must be pleaded as a defense." *And see* Royal Air Properties, Inc. *v.* Smith, 312 F.2d 210 (9th Cir. 1962), 333 F.2d 568 (9th Cir. 1964); 2A J. MOORE, FEDERAL PRACTICE 1853 *et seq.* (2d ed. 1968), and cases cited by Moore therein which indicate that unreasonable delay and the like are affirmative defenses to rescission which a defendant must raise under Federal Civil Rule 8(c).

himself carefully qualified his views as to burden by adding (at 452-53):

> The rule would seem to be established that the burden is upon the rescinding party to show that he acted promptly in seeking rescission. The requirement of prompt action is usually made an element of the cause of action. *As a practical matter, however, the burden of moving forward with the evidence is usually shifted with great facility to the defending party.* A rescinding party who will admit that he discovered a fraud more than a week or two before making a tender is rare. Such admission might, of course, mean an immediate dismissal of his cause of action. *The rescinding party's allegations and proof will probably show due diligence. It is then incumbent upon the defendant to show knowledge or notice of the facts at a date earlier than that admitted, and to establish unreasonable delay therefrom.* [*Footnotes omitted; emphasis supplied.*]

In McCormick on Evidence 672 (1954), the author sets forth a three-fold classification of (1) burden of pleading, (2) initial burden of producing evidence, and (3) burden of persuading the factfinder of the existence or nonexistence of the fact. Hopkins did not, in its complaint, or other than orally and conditionally in argument, seek rescission under the 10(b) and 17 counts until it was permitted by this Court to amend its complaint after this Court filed its opinion in 326 F. Supp. 250. After Hopkins so amended its complaint, this Court permitted Hutton to plead unreasonable delay and laches on the part of Hopkins without in any way waiving Hutton's primary position that Hopkins has the burden of alleging and proving Hopkins' own lack of knowledge. This Court gave to Hopkins that opportunity to amend its complaint and then afforded to Hutton the right affirmatively to plead unreasonable delay by Hopkins, because this Court believes that Hopkins, seeking rescission in a 10(b) or 17 action, does not

have the burden, in such a suit which finds its genesis in common law precedents and in the remedial purposes of the '33 and '34 securities legislation, of pleading lack of unreasonable delay, and that obversely Hutton has the burden of affirmatively pleading such delay by Hopkins if Hutton is desirous of relying upon such delay as a bar to Hopkins' entitlement to rescission under 10(b) or 17. But, in any event, Hopkins has come forward, in this case, within the framework of Federal Civil Rule 56, to establish on the record Hopkins' own lack of delay. In cases appearing to involve lengthy delay, the burden of coming forward to establish lack of or reason for delay may shift to the plaintiff even if the initial pleading burden is upon the defendant. *See, e.g., Marsh* v. *Whitmore,* 88 U.S. (21 Wall.) 178 (1874); *Harwood* v. *Cincinnati & Chicago Airline R.R. Co.,* 84 U.S. (17 Wall.) 78 (1873); and *Badger* v. *Badger,* 69 U.S. (2 Wall.) 87 (1865), cited in *Twin-Lick, supra.* Friedman (at 452-53, quoted herein at p. [C-30] *supra*) places upon the would-be rescinder the burden of pleading lack of delay and perhaps also the burden of coming forward to establish such delay and then, if those burdens are met, shifts to the defendant the burden of at least matching the "coming forward" of the plaintiff. In this case, Hopkins, since this Court filed its last opinion, has come forward to establish lack of delay. Hutton, on the other hand, has not controverted that showing in any way. In addition, the present record in this case discloses that *neither* Hopkins *nor* Hutton zeroed in on the wrongdoing and the individual wrongdoers until the spring and summer of 1963. Under the circumstances, Hutton cannot be heard to say, on the current state of the record herein, that Hopkins, in order to be entitled to rescission under 10(b) or 17, was required, more successfully, more extensively or more speedily, to "probe the data upon which [it] based [its] purchase" or any other data. *Hopkins* v. *Hutton,* 422 F. 2d *supra* at 1131.[25] That burden was enunciated in 1970 on

[25] Quoted at p. [C-20—C-21] *supra.*

the basis of the record then existing in this case by Judge Butzner in connection with Section 12(2) and its related Section 13 requirements—not in 1972 upon the present record in connection with 10(b) or 17 relief. To put it another way, Hutton, "the wrongdoer cannot [in a common law, or 10(b) or 17 proceeding] make extreme vigilance and promptitude conditions of rescission" by the wronged party, Hopkins. *Pence* v. *Langdon, supra.*[26] Nor may Hutton, faced with Hopkins' motion for summary judgment and the undisputed facts concerning lack of delay established by Hopkins in support of that motion, successfully take the position that Hutton is permitted to wait until trial to produce evidence that Hopkins knew or should have known of Hutton's wrongdoing at a time substantially prior to July 26, 1963 and that Hopkins should have accused Hutton thereof and demanded rescission prior to July 26, 1963. That conclusion is compelled whether Hutton, or Hopkins, would be required at trial to shoulder McCormick's third burden, i.e., the burden of persuasion. But it is a conclusion which is particularly required if Hutton, as would seem to be the case under the views expressed by the Supreme Court in *Pence* v. *Langdon, supra,* and indicated in the *Restatement of Restitution, supra,* would have to shoulder and meet that third and ultimate burden of proof, if this case should go to trial.

Accordingly, this Court holds that Hopkins may rescind its March 1, 1961 purchase of the oil production payment and hereby grants Hopkins' motion for summary judgment for rescission under Counts II, III and V. Hopkins shall present to this Court for its consideration a decree modelled upon the decree set forth at 297 F. Supp. 1165, 1237 *et seq.*

FRANK A. KAUFMAN
United States District Judge

[26] Quoted at p. [p. C-26] 26 *supra.*

Appendix D

Supplementary Opinion, Dated June 22, 1972

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

THE JOHNS HOPKINS UNIVERSITY *v.* JAMES M. HUTTON, JR., ET AL.	CIVIL No. 15098

Filed: June 22, 1972

JOHN HENRY LEWIN, EDMUND P. DANDRIDGE, JR., and VENABLE, BAETJER AND HOWARD, of Baltimore, Maryland, for Plaintiff.

JOHN A. WILSON, MICHAEL J. DESANTIS, and SHEARMAN AND STERLING, of New York, New York; and JOHN F. KING, of Baltimore, Maryland, for Defendants.

KAUFMAN, District Judge.

SUPPLEMENTARY OPINION

This Court has this day entered a Decree in this case pursuant to the conclusions set forth in its opinion filed on March 29, 1972. At the conclusion of that opinion, Hopkins was instructed by this Court to present for consideration a Decree modelled upon the Decree set forth at 297 F. Supp. 1165, 1237 *et seq.* Hopkins has so done, and Hutton has filed a memorandum of specific objections thereto. Those objections are discussed *seriatim* in this Supplementary Opinion.

Opinion, Dated June 22, 1972

1. Hutton objects to the inclusion of the following underscored words in paragraph 1 of the Decree which this Court has this day entered:

> [Hutton shall] ". . . pay to plaintiff, The Johns Hopkins University, the purchase price of the production payment hereinafter mentioned amounting to $1,300,000.00, together with interest, at the rate of six percent (6%) per annum from March 1, 1961, *pursuant to Supplementary Opinion of this Court filed December 10, 1968, the equitable principles enunciated therein being equally applicable to the rescission hereby decreed,* as follows:"

Hutton points out that this Court's Supplementary Opinion of December 10, 1968 related to Count I of Hopkins' amended complaint, stated under Section 12(2) of the 1933 Act and does not apply to Counts II, III and V which are stated under Section 10(b) of the 1934 Act and Section 17(a) of the 1933 Act. Hutton's said position is noted and is rejected for the reasons set forth in this opinion.

2. Hutton objects to the allowance of interest to Hopkins from March 1, 1961 and contends, to begin with, that this Court should not exercise its discretion to allow prejudgment interest to Hopkins but that if this Court so does, then, in any event, such interest should commence to run as of March 31, 1972, following the filing by this Court of its March 29, 1972 opinion. While this Court's comments at 297 F. Supp. 1165, 1233, and n.7 thereto, and the principles therein discussed, were expressed in the context of a Section 12(2) case, nevertheless those same comments and principles, considered against the factual background of this case and the remedial purposes of both Section 10(b) and Section 17, dictate in this case, in the opinion of this Court, the allowance of interest from March 1, 1961. In so doing, this Court notes Judge Wyatt's exercise of his discretion against allowance of

prejudgment interest in *Ross* v. *Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967), a 10b-5 case. But in the within proceeding, the equities discussed at length in prior opinions of this Court point to an exercise of discretion in favor of a grant of prejudgment interest, commencing March 1, 1961.

3. Hutton objects to the allowance of interest to Hopkins at the rate of 6%. For the reasons set forth at 297 F. Supp. 1165, 1227-30, this Court will allow interest at the rate of 6%. In that connection, there has been no submission by Hutton of any data concerning prime interest rates from and after October, 1968. *See* 297 F. Supp. 1165, 1230.

4. Hutton objects to the disallowance of interest to defendants on income and payments received by Hopkins from Trice and others. For the reasons set forth at 297 F. Supp. 1165, 1230-31, this Court believes that a "fair result"[1] will only occur if interest to defendants on such income and payments is disallowed. This Court reaches that conclusion upon consideration of applicable equitable principles, independent of the provisions of Section 12(2) of the 1933 Act.

5. Hutton objects to the exclusion by the Court from income received by Hopkins of the sums of $3,142.36 and $41,824.94, which appear near the end of paragraph 1 of the Decree being entered as of this day by this Court in this case[2]. For the reasons set forth at 297 F. Supp. 1165, 1232-33, Hutton's contentions in that connection are hereby rejected.

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[1] 297 F. Supp. 1165, 1231.

[2] The figure of $41,824.94 is substituted for the figure of $20,302.73 which appears at the end of paragraph 1 of this Court's Decree filed December 10, 1968, 297 F. Supp. 1165, 1237, because, between September 1, 1968 and March 31, 1972, Hopkins returned to Trice Production Company (reorganized) and Oleum, Incorporated, its successor, an additional $21,522.21, pursuant to the same agreement and for the same purpose as the sum of $20,302.73.

6. Hutton objects to the exclusion from the Assignment of the Production Payment and Net Profit Overriding Royalty Interest, which is Exhibit A to the Decree of even date herewith, of the Trice Letter of Guarantee to Hopkins dated February 23, 1961. For the reasons set forth at 297 F. Supp. 1165, 1235-36, this Court again approves the use of separate documents of assignment and guarantee, while reiterating its comments at 297 F. Supp. 1165, 1236, that it is "attaching little or no significance to whether there should be one or two reassignment documents . . . ."

7. Hutton asks that the general warranty, set forth in Exhibit A to the Decree of even date herewith, not be limited to the Production Payment but include also the property described in the Annexes to the Production Payment. Hutton also contends that Hopkins' agreement to warrant and defend should not be limited solely to the Production Payment itself, as to persons making claims against Hutton by or through Hopkins, but should be extended to the properties described in the Production Payment and in the Annexes thereto. For the reasons set forth by this Court at 297 F. Supp. 1165, 1236, those contentions are rejected.

8. Hutton also asks that the exception at the end of the special warranty in Exhibit A be eliminated. That exception is limited to specified documents and acts. Its presence in Exhibit A would appear required by the facts and equities herein.

FRANK A. KAUFMAN
United States District Judge

Appendix E

Opinion, Dated February 18, 1970

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 13,293

THE JOHNS HOPKINS UNIVERSITY,
Appellee,

versus

WILLIAM E. HUTTON, JOSEPH A. W. IGLEHART, JAMES J. LEE, WILLIAM C. MILLER, EARL K. BASSETT, JOHN M. BLEAKIE, ERNEST E. KEUSCH, BENJAMIN D. WILLIAMS, JOHN J. ANGLIM, REGINALD N. BARNARD, JUSTIN J. STEVENSON, JR., J. LOGAN BURKE, JAMES M. HUTTON, III, THOMAS C. CAFONE, HART HAGIN, CLINTON J. COOMBS, ARTHUR J. HAMILL, JAMES M. HUTTON, III, EXECUTOR OF THE ESTATE OF DEFENDANT JAMES M. HUTTON, JR., DECEASED, ROBYN B. HALL, VERNON H. HALL, III AND DUDLEY HALL, EXECUTORS OF THE ESTATE OF DEFENDANT VERNON H. HALL, II, DECEASED; and W. E. HUTTON & CO., A PARTNERSHIP,
Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

Argued November 5, 1969 Decided February 18, 1970

Before BOREMAN, BRYAN, and BUTZNER, Circuit Judges

John F. King (John A. Wilson, Michael J. DeSantis, Robert A. Butler, and Shearman & Sterling on brief) for appellants; John Henry Lewin and Edmund P. Dandridge, Jr. (Venable, Baetjer and Howard on brief) for ap-

pellees; Benjamin C. Howard; Royall, Koegel & Wells, and Bardusch, Johnson, Scheminger & Duncan on brief for Ragnar D. Naess, and Naess & Thomas.

BUTZNER, Circuit Judge:

Johns Hopkins University brought this action against the partners of W. E. Hutton & Co., a stock brokerage firm, to rescind Hopkins' purchase of an oil and gas production payment from Trice Production Co. After extensive pretrial litigation, the district court (Kaufman, J.) granted Hopkins' motion for summary judgment on the ground that Hutton's employee, Gilbert H. LaPiere, had violated Section 12(2) of the Securities Act of 1933.[1] *Johns Hopkins University* v. *Hutton*, 297 F. Supp. 1165 (D. Md. 1968). We hold genuine issues of material fact preclude the entry of summary judgment on the issue raised by Hutton's plea of the statute of limitations. On all other issues, the district court correctly entered summary judgment for Hopkins.

I.

The initial question presented by this appeal is whether the Court erred in holding that the production payment met

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[1] Section 12(2) of the 1933 Act [15 U.S.C. § 77L(2)] provides: "Any person who—

. . .

(2) offers or sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

the statutory definition of a security. Hutton contends that as a matter of law it is not a security, and that in any event the question is beclouded by disputed issues of fact which should be submitted to a jury.

Production payments are frequently used financing devices in the oil and gas industry. The payment Hopkins purchased from Trice represented an interest in oil and gas reserves in the ground to be extracted from 23 specified wells. Trice, which retained an interest in the properties, agreed to extract and market the oil and gas and pay the proceeds from Hopkins' share to Hopkins until it recovered its purchase price of $1,300,000. Also, Trice agreed to pay Hopkins from the production of the wells 6% return on the unpaid balance of the purchase price and a specified percentage of the net profit. Since certain of the wells were subject to a prior production payment, Trice guaranteed payment of the 6% return until the underlying production payment terminated.

The sale of Hopkins' production payment was not an isolated transaction. Trice sold two production payments to another investor and a second payment to Hopkins. Trice and LaPiere also sought to persuade a number of prospective investors, individually or through a syndicate, to purchase others. In all Trice planned to sell production payments in the amount of about $10,000,000.

Section 2(1) of the 1933 Act,[2] defines "security" as, among other things, an investment contract. And though

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[2] Section 2(1) of the Securities Act of 1933 [15 U.S.C. § 77b(1)] provides:

"When used in this subchapter, unless the context otherwise requires—

"(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription,

the device be novel or uncommon, it may qualify as a security if, as a matter of fact, it has been "widely offered or dealt in under terms or courses of dealing which established [its] character in commerce as [an] 'investment contract' . . . ." *S.E.C.* v. *Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943). The definition of an investment contract found in *S.E.C.* v. *Howey Co.*, 328 U.S. 293, 298 (1946), embraces Hopkins' production payment. There the Court, teaching that form should be disregarded for substance and that emphasis must be placed on economic reality, said:

> "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. . . . It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."

The fact that Hopkins' production payment is unique because it deals, as do production payments generally, with specific wells does not exclude it from coverage of the Act. The transactions in *Howey* coupled the sale of acreage in a citrus grove with service contracts for the cultivation, harvesting, and marketing of the fruit. Since each sale involved a different plot of the orchard ranging in size from less than an acre to more than five acres, it is apparent that

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transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

each investment contract was novel. Nevertheless, the Court held that the transactions were subject to the Act.[3]

Nor does the fact that Hopkins would not have purchased the production payment without Trice's guarantee preclude summary judgment on this issue. The definition of a security expressly includes a guarantee of any of the other devices enumerated in Section 2(1).[4] Therefore, a guarantee cannot have the effect of denying coverage to an instrument that otherwise satisfies the Act's definition of a security. Whether the guarantee is a part of the production payment or collateral to it is immaterial. In either event the entire transaction, including the guarantee, falls within the statutory definition of a security.

We conclude, therefore, that the district court correctly held as a matter of law that Hopkins' production payment was an investment contract within the meaning of the Act because it involved "an investment of money in a common enterprise with profits to come solely from the efforts of others," *S.E.C.* v. *Howey Co.*, 328 U.S. 293, 301 (1946), and because it satisfied the common offering and trading requirements set forth in *S.E.C.* v. *Joiner Leasing Corp.*, 320 U. S. 344, 351 (1943).

II.

Judge Kaufman properly analyzed and applied Section 12(2) of the 1933 Act, saying:

> "Hutton violated Section 12(2) if, as a broker, it offered or sold to Hopkins, a security as defined by

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[3] Other contracts linking the sale of individual units or parcels of property with their care or servicing have been held to be securities. See, e.g., Continental Marketing Corp. v. S.E.C., 387 F.2d 466 (10th Cir. 1967), *cert. denied*, 391 U.S. 905 (1968) (beavers); S.E.C. v. Payne, 35 F.Supp. 873 (S.D.N.Y. 1940) (silver foxes); Hollywood State Bank v. Wilde, 70 Cal. App. 2d 103, 160 P.2d 846 (Dist. Ct. App., 2d Dist., 1945) (chinchillas); S.E.C. v. Bailey, 41 F. Supp. 647 (S.D. Fla. 1941) (tracts of land for growing tung trees).

[4] See n.2, *supra*.

> Section 2(1) of the '33 Act using the mails, or an instrument of, or communication in, interstate commerce to accomplish the same, by means of an untrue statement of material fact or by omitting to state a material fact necessary in order to render the statements Hutton made not misleading under the circumstances in which the statements were made; provided that Hopkins did not know of such untruth or omission, [and] that Hutton knew, or in the exercise of reasonable care, could have known of such untruth or omission . . . .'' 297 F. Supp. at 1208.

There can be no doubt that Hutton, a broker acting through LaPiere, offered and ultimately sold to Hopkins a security by using the mails or other means of interstate communication. There is also no doubt that significant —indeed probably the most important—information for Hopkins to consider in purchasing the production payment was the future net revenue for the 23 wells underlying the payment, for it was from this revenue that Hopkins expected to recoup its investment and make a profit. The amount of the future net revenue could not be measured; it could only be estimated, and the reliability of the estimate rested upon the judgment of the estimator. DeGolyer & MacNaughton (D & M) was among the most respected engineering firms engaged in supplying independent estimates of the worth of oil and gas properties. Trice furnished Hopkins a brochure which showed the estimate of the total future net revenue for all 23 wells to be $6,500,000. LaPiere represented that this estimate was made by D & M. LaPiere also represented that the D & M estimate showed a return of $2,905,000 as Hopkins' share of the future net revenues. LaPiere, however, knew that D & M had neither estimated all of the wells nor provided a basis for calculating Hopkins' share of the future net revenues. Moreover, LaPiere omitted to tell Hopkins that in order to show future net revenues of $6,500,000 it was necessary to sub-

stitute for conservative estimates on some of the wells higher estimates from other sources.

The district court held, and we agree, no genuine issue of fact was presented concerning the materiality of LaPiere's misrepresentations and omissions. A fact is material if it concerns information about which "an average prudent investor ought reasonably to be informed before purchasing the security . . . ." *Demarco* v. *Edens*, 390 F.2d 836, 840 (2d Cir. 1968), citing 17 C.F.R. § 230.405(1). Or, as formulated by the Restatement of Torts § 538(2)(a) (1938): "A fact is material if . . . its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question . . . ." The materiality of LaPiere's misrepresentations and omissions becomes readily apparent by comparing the estimate of future net revenues of $6,500,000 he vouched to Hopkins with the estimate of $5,355,744 Trice and LaPiere had previously furnished another investor. Clearly, a "reasonable man would attach importance" to this discrepancy of over a million dollars. Also, an "average prudent investor" ought reasonably to have been informed that independent appraisers furnished much lower estimates on some of the wells than the figures used to compile the total of $6,500,000.

Generally the issue of materiality, resting as it does upon the reaction of a "reasonable man", cannot be decided by summary judgment. *Rogen* v. *Ilikon Corp.*, 361 F. 2d 260, 265 (1st Cir. 1966). But here the discrepancies in basic data are so large, and the facts misrepresented and withheld are so obviously important to an investor, that reasonable minds cannot differ on the question of materiality. Since the underlying facts and the inferences to be drawn from these facts are free from controversy, summary judgment was appropriate. Cf. *Mills* v. *Electric Auto-Lite Co.*, 403 F.2d 429 (7th Cir. 1968), *rev'd on other grounds*, 38 U.S.L.W. 4097 (U.S. Jan. 20, 1970); *Whitlow*

& Associates, Ltd. v. *Intermountain Brokers, Inc.*, 252 F. Supp. 943 (D. Hawaii 1966); *S.E.C.* v. *Latta*, 250 F. Supp. 170 (N. D. Cal.), *aff'd* 356 F.2d 103 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966); *Guardian Investment Corp.* v. *Rubenstein*, 192 A.2d 296 (D.C. Ct. App. 1963).

Hutton asserts that a genuine issue of fact exists over the question of whether Hopkins should be barred from recovery under Section 12(2) of the Act because it knew of the untruths and omissions on which judgment was entered. The facts, however, refute this contention. Shortly before the purchase of the production payment, Trice furnished information which disclosed that the estimates for thirteen wells came from sources other than D & M. To this extent the information revealed LaPiere's misstatements about the identity of the estimators. But in order to support the fictitious estimate of $6,500,000, Trice's report was false in a number of respects, and it, too, omitted to inform Hopkins that D & M had made smaller estimates on some of the wells than the estimates set forth in the report. The undisputed evidence shows that neither Hopkins, nor its advisers, learned from this report, or from any other source, the complete truth essential for prudent evaluation of the wells.

Hutton next contends that the element of "causation" presents a genuine issue of fact precluding summary judgment. LaPiere's representations, Hutton says, did not cause Hopkins to buy the production payment. On the contrary, the argument runs, Hopkins made its purchase because of information it received from its own advisers and from Trice and also because of Trice's guarantee. Under Section 12(2), however, a buyer need not prove that he relied on the misstatement or omission. "To say that purchaser reliance is a prerequisite to seller liability is to import something into the statute which is not there." *Woodward* v. *Wright*, 266 F.2d 108, 116 (10th Cir. 1959). Accord, *Trussell* v. *United Underwriters, Ltd.*, 228 F. Supp. 757,

768 (D. Colo. 1964); *Athas* v. *Day*, 161 F. Supp. 916, 918 (D. Colo. 1958); *Thiele* v. *Shields*, 131 F. Supp. 416, 419 (S.D. N.Y. 1955); see 3 Loss, Securities Regulations 1702 (2d ed. 1961).

Hutton's theory of "causation" is an impermissible attempt to introduce reliance upon the misrepresentations and omissions as a necessary element of Section 12(2). A similar ploy was summarily rejected in *Demarco* v. *Edens*, 390 F.2d 836, 841 (2d Cir. 1968), where the seller sought to defend on the ground that the sale was not "by means of" an offending circular. Information about future net revenues was essential to Hopkins' decision to purchase, and this information was tainted by LaPiere's material misrepresentations and omissions. These facts establish as a matter of law sufficient casual relationship between LaPiere's violation of the Act and Hopkins' injury. Hopkins need not also prove that the defects in LaPiere's data had a decisive effect on its contract. Cf. *Mills* v. *Electric Auto-Lite Co.*, 38 U.S.L.W. 4097 (U.S. Jan. 20, 1970). Since Hutton's defense lacks warrant in law, it is no bar to summary judgment.

Hutton, relying on *Kamen & Co.* v. *Paul H. Ashkar & Co.*, 382 F.2d 689 (9th Cir. 1967), *cert. granted*, 390 U.S. 942, *cert. dismissed*, 393 U.S. 801 (1968), claims that the partners of the brokerage firm are not liable because they did not participate in, or have knowledge of, the representations made by their employee, LaPiere. Factual differences alone make *Kamen* inapplicable. There the court held the employee did not have apparent authority to enter into transactions that turned out to be fraudulent. Here, on the contrary, the evidence is undisputed that, although the Hutton partners were personally blameless, they clothed LaPiere with actual and apparent authority to provide Hopkins with information about the production payments. LaPiere, as manager of Hutton's oil and gas department, acted within the scope of his employment in offer-

ing the production payment to Hopkins, and for his service Trice paid Hutton a substantial commission. Hutton is liable, under familiar principles, for the tortious representations of its agent. Restatement (Second) of Agency §§ 257, 258 (1958). For reasons fully stated by Judge Kaufman,[5] we agree that Section 15 of the Act [15 U.S.C. § 77o] was not intended to insulate a brokerage house from the misdeeds of its employees.

III.

Section 13 of the Act [15 U.S.C. § 77m] provides in part:

> "No action shall be maintained to enforce any liability created under section [12(2)] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence .... In no event shall any such action be brought ... more than three years after the sale."

Hopkins sued well within the three-year period of limitations. Therefore, the issue is whether its action was commenced within one year after discovery of LaPiere's misrepresentations and omissions, or "after such discovery should have been made by the exercise of reasonable diligence". Hopkins filed its suit on November 1, 1963, so inquiry must concentrate on the nature and extent of Hopkins' knowledge before November 1, 1962, and particularly whether it used due diligence after its purchase on March 1, 1961 to discover the wrongs about which it now complains. See *Rosenberg* v. *Hano,* 121 F.2d 818, 821 (3d Cir. 1941). The district judge found that the material facts were not in controversy and that Hopkins had not actually discovered LaPiere's misstatements and omissions before

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[5] Johns Hopkins University v. Hutton, 297 F. Supp. 1165, 1209 (D. Md. 1968).

the critical date. Viewing the question of reasonable diligence as the application of a standard and therefore a question of law, he concluded Hopkins had exercised due diligence and that its action was not barred by the statute of limitations.

Before November 1, 1962 Hopkins learned that Trice was in financial trouble, that some of its checks were returned for insufficient funds, that Trice's report of its financial condition could not be reconciled with Dun & Bradstreet's, that the return from another production payment was behind schedule, that some of the wells underlying Hopkins' payment were not producing or were underproducing, and that an involuntary petition for bankruptcy had been filed against Trice.

To be sure, Hopkins and its advisers did not stand idly by as this bad news rolled in. They conducted investigations that led them to believe that Trice's troubles, and Hopkins' own worries, were caused by factors other than deficiencies in the estimates of the future net revenue. But the one-year limitation of Section 13 does not depend wholly on the subjective judgment of the buyer. Instead it must be tested by the objective standard of reasonable diligence on the part of the buyer in making discovery. *Rosenberg* v. *Hano,* 121 F.2d 818, 821 (3d Cir. 1941); cf. *Goldenberg* v. *Bache & Co.,* 270 F.2d 675, 681 (5th Cir. 1959).

Perhaps, as Hopkins argues, Trice's shaky financial condition would not alert an investor to fraud. But surely the failure of some wells to produce as scheduled coupled with Trice's lack of candor about its finances might cause a reasonably diligent investor to probe the data upon which he based his purchase. Had Hopkins compared all the experts' reports, which it had a right to do under the terms of the production payment, it could readily have discovered the untrue statements and the omissions about which it now complains.

On summary judgment we must view the inferences pertaining to Hopkins' diligence in the light most favorable to Hutton, the party opposing the motion. Since inferences contrary to those drawn by the district judge might be permissible, a genuine issue of fact was raised that should have been submitted to a jury. *United States* v. *Diebold,* 369 U.S. 654, 655 (1962). But Hopkins urges us to follow *Dale* v. *Rosenfeld,* 229 F.2d 855, 858 (2d Cir. 1956), which held that when a judge is the trier of fact the standard of due diligence is a question of law. And, continues Hopkins, since the issue of due diligence is a question of law, application of the statute of limitations was rightly decided by summary judgment. However, we need not in this case review the oft mooted question of whether a standard of care, such as reasonable diligence, presents a question of fact or of law or of both,[6] for the rule stated in *Dale* is not applicable here. Hutton has demanded a jury, and the *Dale* court recognized, albeit by implication, that when a jury is the trier of fact, the issue should be submitted to it. See also *Mamiye Bros.* v. *Barber Steamship Lines, Inc.,* 360 F.2d 774, 777 (2d Cir.), *cert. denied,* 385 U.S. 835 (1966) (dictim). It is sufficient for us to say that when, as here, a jury has been demanded and the facts give rise to conflicting inferences on the issue of reasonable diligence, the question must be submitted to the jury. *Azalea Meats, Inc.* v. *Muscat,* 386 F.2d 5, 9 (5th Cir. 1967); cf. *Schillner* v. *H. Vaughan Clarke & Co.,* 134 F.2d 875, 878 (2d Cir. 1943).[7]

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[6] Compare Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776 (2d Cir.), *cert. denied,* 385 U.S. 835 (1966), with Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 752 (9th Cir. 1960). See Nuckoles v. F. W. Woolworth Co., 372 F.2d 286, 288 (4th Cir. 1967).

[7] Hopkins also claims that Hutton is estopped to plead the statute of limitations because Hutton withheld unfavorable information that came to its attention after the sale. The district judge did not rule on this issue, and in the absence of the necessary factual background, we express no opinion about it.

Opinion, Dated February 18, 1970

IV.

Finally, on two remaining issues, we conclude, for reasons adequately stated by the district court, that rescission is a proper remedy[8] and that Hutton's motion to file a third party complaint against Hopkins' financial advisers was properly denied.[9]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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[8] Johns Hopkins University v. Hutton, 297 F. Supp. 1165, 1224 (D. Md. 1968) (Kaufman, J.).

[9] Johns Hopkins University v. Hutton, 40 F.R.D. 338 (D. Md. 1966) (Thomsen, C. J.).

Appendix F

Opinion Dated August 15, 1968

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

THE JOHN HOPKINS UNIVERSITY *v.* JAMES M. HUTTON, JR., ET AL.	Civil No. 15098

Filed: August 15, 1968.

EDMUND P. DANDRIDGE, JR., JOHN HENRY LEWIN and VENABLE, BAETJER AND HOWARD, Baltimore, Maryland, for Plaintiff.

JOHN F. KING, Baltimore, Maryland, JOHN A. WILSON, MICHAEL J. DESANTIS and SHEARMAN & STERLING, New York, New York, for Defendants.

Opinion*

Dated August 15, 1968

Kaufman, District Judge.

The Johns Hopkins University (Hopkins) seeks summary judgment over the vigorous opposition of defendants. The record is voluminous; the cast of characters is numerous; and the narration of the opposing versions of an unusual financial tale could easily outlast several double features. Defendants contend that the case is too complex for summary judgment. The answer to that contention, however, is easily discerned after the material, undisputed facts are culled from the massive record and are permitted to stand alone. In such posture they compel, against the background of applicable law, only one conclusion: This case is ripe for summary judgment for plaintiff.

The defendants are James M. Hutton, Jr., et al., copartners, doing business as W. E. Hutton & Co. (Hutton), a stock brokerage firm with its principal place of business in New York City, and with numerous branch offices, including one in Baltimore. Hopkins alleges that Hutton violated duties which it owed to Hopkins under the Securities Act of 1933 (the '33 Act), the Securities and Exchange Act of 1934 (the '34 Act) and the common law. Specifically, Hopkins alleges that Hutton made misrepresentations of, and omitted to disclose, material facts, and also engaged in fraudulent and negligent conduct. The controversy arises out of the purchase by Hopkins on March 1, 1961, of an oil and gas production payment for $1,300,000 from Trice Production Company (Trice) in connection with which transaction Hutton received a commission from Trice.

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* As corrected by memorandum of Kaufman, J., dated and filed December 10, 1968. See *infra*, F123-F127.

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Since Hopkins began this suit on November 1, 1963, the parties have indefatigably engaged in discovery, legal and factual argument, and motion hearings. Before oral argument on Hopkins' motion for summary judgment, Hutton's chief counsel stated in his main affidavit that Hutton had deposed eleven, and Hopkins twelve, witnesses, involving 7,401 pages of testimony; that Hutton had marked as exhibits approximately 818 documents and Hopkins had so marked about 212 documents, or a total of 1,030 documents; that Hutton had served upon Hopkins two sets of interrogatories and two sets of requests for admissions and that Hopkins had served upon Hutton thirteen sets of interrogatories and seven sets of requests for admissions, embodying a total of more than 2,083 separate inquiries in such interrogatories and requests for admissions. This Court calculates that the pleadings, the motions, the discovery documents, the main and supplementary affidavits of Hutton's chief counsel, and other factual and legal memoranda and commentary to the Court exceed 12,000 pages.

There have been lengthy hearings and conferences, involving several scores of days before this Court and before a special Master who was at one time appointed with regard to objections to discovery interposed by both sides. After Hopkins filed its original complaint, Hutton answered and prayed a jury trial, Hopkins later was granted leave to file an amended complaint, Hutton answered, and Hutton later sought to file a third-party complaint against Ragnar D. Naess, et al., co-partners doing business as Naess & Thomas, Hopkins' investment counsel, for contribution as joint tortfeasors, charging Naess with statutory and common law violations. Chief Judge Thomsen of this Court denied Hutton leave to file the third-party complaint, "primarily because of the complication of issues

which would result from the filing of the third party complaint, but also because of the delay and expense to Hopkins, the unreasonable expense to Naess, and the laches of Hutton." *Johns Hopkins University* v. *Hutton*, 40 F.R.D. 338 (D. Md. 1966).

Hopkins' amended complaint is set forth in seven counts: (1) Section 12(2) of the '33 Act; (2) Section 10(b) of the '34 Act and Rule 10b-3 of the Securities and Exchange Commission (S.E.C.); (3) Section 10(b) of the '34 Act and Rule 10b-5 of the S.E.C.; (4) Section 15(c)(1) of the '34 Act; (5) Section 17(a) of the '33 Act; and (6) and (7) under the common law for (a) false representation and fraudulent conduct and (b) making false representations negligently and with reckless indifference as to their truth.

Hopkins' motion for summary judgment was presented with regard to each of the first five or statutory counts. Near the close of his rebuttal, during oral argument on Hopkins' motion for summary judgment, Hopkins' counsel stated that if the Section 12(2) equitable relief sought by Hopkins under count one of the amended complaint should be granted, Hopkins would consider itself fully satisfied (Tr. 458-463). Therefore, since summary judgment will be granted to Hopkins under count one, the issues raised by the other counts are moot.[1]

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[1] Section 12(2) of the '33 Act reads as follows:

Any person who—

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the

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Hopkins' Amended Complaint was summarized by Judge Thomsen at 40 F.R.D. 338, 340-41, *supra,* as follows:

> purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security. [15 U.S.C.A. §77l(2)].

Section 2(1) of the '33 Act defining "security" and Section 13 of the '33 Act setting forth the limitations period applicable to Section 12, each of which figures prominently in this case, respectively provide:

> (1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [Section 2(1) of the '33 Act, 15 U.S.C.A. §77b(1)].
>
> No action shall be maintained to enforce any liability created under section 77k or 77 l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77 l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77 l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77 l(2) of this title more than three years after the sale. [Section 13 of the '33 Act, 15 U.S.C.A. §77m].

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In 1960, Hutton was employed by Trice to act as its adviser, broker and agent in the sale of production payments carved out of certain oil and gas properties owned by Trice. Hutton offered for sale and sold three such production payments, including the one offered for sale and sold to Hopkins, and Trice paid Hutton commissions amounting to 2% of the sales price obtained.

Pursuant to that arrangement, Hutton and Trice offered to sell to Hopkins a production payment out of certain oil and gas properties of Trice located in Texas, Oklahoma and Louisiana, described in a brochure prepared by Hutton and Trice and delivered by them to the Treasurer of Hopkins. The brochure stated that Trice desired to sell production payments in the amount of $2,700,000; that a commitment for approximately $1,400,000 had been received from a bank as a separate first production payment from certain properties; that a second production payment of approximately $1,300,000 from the same properties and from five additional properties (which would be subordinate to the bank's production payment except as to the five additional properties) would also provide for certain net profits interests; and that, based on stated estimates of the value and rate of realization of the oil and gas reserves in the properties subject to the second production payment, the purchaser thereof would realize a substantial sum in excess of its cost.

Hutton represented to Hopkins, as a further material inducement to purchase the production payment, that the estimates of future net revenues and rate of realization from the oil and gas reserves set forth in

the brochure were the estimates of independent engineers who had studied each of the properties.

Hutton also recommended to Hopkins and to Naess, Hopkins' financial adviser, that they select Chester L. Brown, Vice-president of Petroleum Consultants, Inc., to make a study of the reserves and a check of said estimates on behalf of Hopkins, at Trice's expense. In making this recommendation Hutton did not reveal that the employee of Hutton who was dealing with Hopkins had been for many years an intimate friend and associate of Brown, had recently encouraged him to form his consulting engineering company and had indicated to Brown that Hutton would employ him in connection with this production payment. In early 1961, without the knowledge of Hopkins, Hutton employed Brown, at the joint expense of Hutton and Trice, to make a study and estimate of said reserves not for Hopkins but for Hutton and Trice; instructed Brown to make a report which would omit details; concealed from Brown that Hopkins had been led by Hutton to believe that Brown was an independent engineer acting for Hopkins; concealed from Brown the existence of the reports and estimates that had been made by independent engineers for Trice concerning which Hutton had made representations to Hopkins; and failed to request Brown to make any check of such reports or estimates.

While Brown was making his study and estimates for Hutton and Trice, Hutton represented to Hopkins that Brown was making the study and estimate as Hopkins' 'independent reservoir engineer', and, acting as such, was checking the earlier reports and estimates of said reserves made by the independent engineers.

Hutton represented to Hopkins that Brown's study and estimates showed that the figures previously presented by Hutton were conservative and that Hopkins could expect repayment of its investment with interest in a shorter time and could expect a greater return from its net profits interest than had been estimated by the original independent engineers. Hutton forwarded to Hopkins Brown's report which confirmed those representations.

Relying to a material degree on each of said material representations made by Hutton, Hopkins purchased for $1,300,000 the production payment and net profits interests on March 1, 1961.

On October 15, 1962, Trice filed in the United States District Court for the Eastern District of Texas, Tyler Division, a Petition for Reorganization under Chapter X of the Bankruptcy Act. In early 1963, Hopkins received a report disclosing that the reserves of oil and gas in the properties included in the $1,300,000 production payment purchased by Hopkins were substantially less than as represented by Hutton. Also in 1963, within one year prior to the filing of the original complaint herein, Hopkins learned for the first time that the alleged representations made by Hutton were false, and learned for the first time of the alleged skulduggery in connection with Brown's report.

In their answer to the amended complaint, defendants, among other things:

1. Admitted that all of the individual defendants, excluding defendants Joseph A. W. Iglehart and Benjamin

D. Williams who were limited partners, were conducting business under the name of W. E. Hutton & Co. (Hutton);

2. Admitted that the defendants maintained an office in the District of Maryland;

3. Conceded that this Court has jursidiction;

4. Admitted that in 1960 Trice was a Delaware corporation having its principal place of business in Texas;

5. Admitted that in 1960 Hutton performed certain services in connection with the sale by Trice of certain production payments carved out of certain oil and gas properties of Trice; and that Hutton was paid commissions by Trice amounting to 2% of the face amount of each of three production payments sold by Trice, including the one sold by Trice to the plaintiff on or about March 1, 1961;

6. Admitted that Cliff Trice, President of Trice, and Gilbert LaPiere, an agent and employee of Hutton, met in Baltimore on September 21, 1960, with Henry Baker, Treasurer and Financial Vice President of Hopkins, at which time a $1,300,000 production payment carved out of certain oil and gas properties of Trice located in Texas, Oklahoma and Louisiana was discussed;

7. Admitted that Hutton had in their possession on December 8, 1965, a writing entitled "General Comments Pertaining to Purchase of Oil and Gas Production Payment" dated September 16, 1960; that Trice prepared that brochure; that that brochure, or a copy thereof, was delivered to Baker by Cliff Trice on or about September 21, 1960, during a conference at Hopkins in Baltimore ar-

ranged by Naess; and that Naess had received a copy of that brochure;

8. Specifically denied that that brochure was prepared by Hutton either in whole or in part;

9. Admitted that LaPiere wrote a letter to Baker, dated February 3, 1961, in which a reference is made to "my brochure of September 16, 1960"; defendants contend that the word "my" was incorrectly or inadvertently used, although not intentionally so;

10. Alleged that Petroleum Consultants, Inc. and particularly Brown were selected by Hopkins to make an independent expert study of certain properties of Trice, an estimate of the reserves therein and future profits therefrom; and that LaPiere, at the request of Hopkins, wrote a letter to Petroleum Consultants, Inc., dated January 5, 1961;

11. Admitted that LaPiere knew Brown prior to January 5, 1961;

12. Admitted that LaPiere, or someone on his behalf wrote letters to Mark Harriman of Naess and Thomas and to Baker dated respectively January 16, 1961, and February 3, 1961;

13. Admitted that Hopkins accepted an offer made by Trice that Hopkins purchase for $1,300,000 a production payment and net profits interest carved out of certain oil and gas properties of Trice located in Texas, Oklahoma and Louisiana; and that that purchase was consummated in Texas on or about March 1, 1961;

14. Alleged that Naess and Thomas were investment counsel for Hopkins for over twenty years and in pursuance thereof, Walton Canedy, the Baltimore partner of Naess and Thomas, attended every meeting of the Hopkins Finance Committee between January 1, 1960 and the date Hopkins commenced this action;

15. Alleged that Naess was a friend and acquaintance of Cliff Trice since at least 1957; that in 1958 Naess made personal investments in Trice's oil drilling ventures; and that Naess recommended to his clients that they invest in participations in such ventures of Trice;

16. Alleged that on August 30, 1960, Trice wrote a letter to Naess and enclosed a Trice brochure dated August 8, 1960;

17. Alleged that on September 14, 1960, Cliff Trice personally called on Naess in New York and proposed the purchase of an oil production payment by Hopkins;

18. Alleged that Trice sent Naess a Trice brochure dated September 16, 1960, the substance of which Naess communicated to his partner Canedy, asking the latter to pass it on to Baker; and that Baker indicated to Canedy he was interested;

19. Alleged that Naess arranged the meeting with Baker on September 21, 1960 at Hopkins (referred to in 7 above), attended by Cliff Trice, Canedy, and LaPiere, at which meeting Cliff Trice delivered to Baker a copy of Trice's September 16, 1960 brochure;

20. Alleged that during the Fall of 1960, Gordon Meeks, a friend of Naess, told Naess he was forming a new petroleum consulting firm with Brown, known as Petroleum

Consultants, Inc. and that thereafter Naess selected Brown as Hopkins' own independent oil consultant to check the oil and gas reserves in the Trice production payment offered by Trice to Hopkins;

21. Alleged that in October, 1960, Bankers Trust Company of New York City (Bankers Trust or Bankers) purchased a $1,375,000 payment from Trice through Bankers' nominee, Oilco, Inc., under which Bankers occupied a primary position with respect to approximately 18 of the 23 wells in the production payment under consideration by Hopkins, pursuant to which the latter would occupy a primary position as to 5 wells and a secondary position to Bankers as to the aforesaid 18 wells.

22. Alleged that Naess and Thomas and Hopkins gave consideration to Hopkins' investment policy in July or August, 1960, and steps to restate that policy were taken by Hopkins Finance Committee in October, 1960; that on November 25, 1960, that Committee adopted a restatement of its investment policy pursuant to which Hopkins was authorized to invest up to 10% of its endowment funds in certain types of investments including the type offered by Trice to Hopkins and that on January 27, 1961, that Committee met and formally considered Trice's proposal but did not at that meeting conclude consideration of that proposal;

23. Alleged that on February 1, 1961, Hopkins' legal counsel made a written analysis of the Trice production payment, which analysis indicated, *inter alia,* the speculative nature and risks involved in the Trice production payment; that on February 1, 1961, such counsel advised Baker to obtain certain reports of independent engineers, namely, those of DeGolyer & MacNaughton (D & M),

Schafer and Brown, and that on February 1, 1961 such counsel told Baker they "must see" those three reports before the purchase was consummated;

24. Alleged that on February 7, 1961, at a meeting in Baltimore at the office of Hopkins' legal counsel, attended by Mitchell and Worth McCauley of Trice, Baker, and Dandridge and Cooper, members of the law firm representing Hopkins, but not LaPiere or any other Hutton representative, a February 3, 1961, Trice brochure was delivered to Baker;

25. Alleged that no representative of Hopkins, Naess & Thomas nor Hopkins' legal counsel, ever at any time prior to March 1, 1961, obtained the engineering reports of D & M, Schafer or Mercantile National Bank of Dallas;

26. Alleged that Brown, "Hopkins own consultant selected by Naess," made an independent evaluation of the properties involved in the Trice production payment and set forth his opinion in a report delivered to Hopkins, Naess and Thomas, and to Hopkins' legal counsel;

27. Alleged that Naess studied the Brown report, advised Hopkins that he had contacted Baker and the Mercantile National Bank and on February 14, 1961, wrote a letter to Hopkins recommending the purchase, which letter was read at the Hopkins Finance Committee meeting on February 24, 1961, and made part of the minutes of that meeting. At that meeting the Committee approved the purchase of the Trice production payment and the purchase was thereafter consummated on or about March 1, 1961, at which closing Hopkins was represented by its Texas legal counsel, and at which neither LaPiere, nor anyone from Hutton was present;

28. Alleged that Hopkins did not rely upon Hutton or any other defendant but upon Naess, Canedy, others in the firm of Naess & Thomas, Brown, Petroleum Consultants, Inc., Trice, Mitchell, McCauley, others in the Trice Company, Hopkins' general legal counsel in Baltimore, and its special legal counsel in Dallas;

29. Admitted that Trice, on or about October 15, 1962, filed in the United States District Court for the Eastern District of Texas, Tyler Division, a petition for reorganization under Chapter X of the Bankruptcy Act;

30. Denied each and every other allegation in plaintiff's complaint;

31. Stated that the amended complaint failed to state a claim upon which relief could be granted;

32. Alleged that "[i]f any representations were made to Hopkins on behalf of these defendants which included any untrue statement of a material fact or omitted to make the statements in the light of the circumstances under which they were made not misleading, defendants did not know, and in the exercise of reasonable care, could not have known of such untruth or omissions.";

33. Alleged that such material changes and modifications in the Trice production payment purchased by Hopkins on March 1, 1961, had been made since March 1, 1961, that Hopkins had failed to tender back, and was unable to tender back, as required by Section 12(2) of the '33 Act;

34. Pled the one year statute of limitations (See Section 13 of the '33 Act, quoted *verbatim, supra*);

35. Set out defenses numbered Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth which have no application to the first or Section 12(2) count.

On December 22, 1966, Hutton sought leave to amend its answer to the amended complaint and thereby to file a Thirteenth Defense. Over Hopkins' opposition, this Court[2] permitted that additional defense, pertaining to all counts of the complaint, including the first or 12(2) count to be filed. That defense alleges contributory negligence and assumption of risk by Hopkins and states that Hopkins' Finance Committee, its agents and representatives, failed to conform to the standards required of fiduciaries and trustees of an educational institution in approving the purchase of the Trice production payment.

Whether "summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968). The duty of the trial court, in considering such a motion, is not to decide any factual issue but rather to determine whether any factual issue exists which requires determination by the factfinder. *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 305 F. 2d 647, 651 (5th Cir. 1962); *Byrnes* v. *Mutual Life Insurance of New York*, 217 F. 2d 497, 500 (9th Cir. 1954). In this case Hop-

[2] During the hearing with regard to the Thirteenth Defense, this Court stated on the record that it would grant Hutton leave to amend its answer in order to state its Thirteenth Defense, upon presentation of an appropriate Order. Since such Order has never been presented or signed, this Court hereby orders that Hutton's motion so to amend is hereby granted, and that the Thirteenth Defense is deemed filed and in issue in this case for all purposes, including the Summary Judgment motion under consideration in this opinion and all further proceedings in this case. In so doing, this Court is, at this point in its opinion, expressing no opinion with regard to the legal or factual effect of that defense with regard to any count of the complaint. Subsequently, in this opinion, this Court will state its views in connection with the status of the Thirteenth Defense, as it relates to the First Count, in the context of this Court's consideration of Hopkins' motion for summary judgment.

kins urges this Court to make many findings of fact which this Court specifically declines to do in this summary judgment context. But that does not relieve this Court of the obligation to examine the record before it under Rule 56 and to determine if there is lacking any genuine dispute with regard to material facts which in and of themselves provide an undisputed basis upon which plaintiff is entitled to summary judgment relief under Section 12(2) of the '33 Act. Such an examination requires a careful classification of those material facts which qualify as undisputed under Rule 56 standards.[3]

Findings of Undisputed Material Facts

Based upon an exhaustive review of the entire record in this case this Court finds that the following facts are material and that there is no genuine dispute with regard to any of them.[4]

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[3] All motions filed by Hopkins and by Hutton to strike any parts of discovery materials have been denied. Those denials are hereby reaffirmed, as are all prior rulings of this Court and of the Special Master appointed with regard to discovery questions. This Court has carefully considered each of Hutton's points in its motions to strike filed November 8, 1967. In most instances, Hutton's evidentiary contentions, even if accepted by this Court, would have no legal effect in view of the existence of independent relevant and material evidence to which no objection has been or seemingly could be soundly lodged by Hutton. In the several instances in which this is not true, as for example with regard to the affidavit of Harold T. Dokupil and the affidavit of Worth T. McCauley, this Court finds no merit in Hutton's objections. In this connection this Court notes and is applying the standards set forth in Rule 56. *See, inter alia,* 6 J. Moore, Fed. Prac. ¶56.11[5] 2195 *et seq.*; ¶56.22[1] 2801 *et seq.*

[4] The voluminous record in this case does not permit this Court to make individual findings of each and every undisputed material fact. However, this Court has endeavored, and believes that it has succeeded, in not omitting to find any material undisputed fact which could, in any way, require any conclusion as to any legal

1. LaPiere was employed by Hutton, as Manager of its Oil and Gas Department, on March 1, 1957, and resigned from this position in July 1961.

2. The New York Stock Exchange notified Hutton, on or about September 20, 1957, that the Exchange had approved LaPiere's application to act as a duly qualified Registered Representative.

3. In his capacity for Hutton, as Manager of the Oil and Gas Department and as a Registered Representative, LaPiere, among other duties, was authorized to solicit underwritings and other financing from a number of oil companies, to administer from day-to-day the interests of participants in "various" oil drilling programs, to contact the public with regard to purchases or sales of stocks and bonds and investment banking relationships, and to screen and add what information he might have to programs presented by the various oil operators who approached Hutton.

4. Trice Production Co., in early August 1960, mailed copies of the first Schafer report, dated March 27, 1960, the second Schafer report, dated June 8, 1960, and the D & M (April 1, 1960) report, dated June 11, 1960, to LaPiere.

5. The $1,300,000 production payment purchased by Johns Hopkins University, on March 1, 1961, covered a combination of 23 oil and gas wells.

6. The twenty-three wells under this $1,300,000 production payment purchased by Hopkins, and the estimates of their future net revenue contained in the first and second Schafer and the D & M reports are as follows:

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issue in connection with the Section 12(2) count of this case, different from the conclusion which is set forth in this opinion.

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Well	*D&M Estimate*	*1st Schafer Estimate*	*2nd Schafer Estimate*
R. D. McDonald #1	$1,699,536	None	None
Milne #1	361,223	None	None
Dugger #1	119,742	$ 72.858	None
Younger #1	50,473	30,938	None
Dollar #1	11,829	None	None
Barham-Knox #1	8,918	None	None
Noland #2	27,761)[5]	None	None
Noland #3	46,256)[5]	None	None
Noland #4	38,351)[5]	71,402)[6]	
		94,234)[6]	None
Windle	259,861 [7]	None	None

[5] The D & M report contains no breakdown of estimated future net revenue for each Noland well. Dollison's affidavit, p. 2, (Dollison is an engineer for D & M) states that Mackoy (East 4600), Mackoy (East 4900), Mackoy (Hickey), Mackoy (Younger) and Mackoy (3700) are the five separate reservoirs comprising the H.H. Noland lease. The total estimated net revenues for these reservoirs is shown by the D & M report to be $158,623. Dollison has affied that of this amount $112,367 is computed to be the portion attributable to Noland 2, 3, and 4. Of this amount, defendant's counsel, using Dollison's method of allocation, submitted the above D & M figures for only the Noland 2 and 3 wells. The D & M figure for Noland 4, not submitted by the defendant's counsel, is based on the same method of allocation.

[6] Of the total $165,636 estimated future net revenues for Noland 4 from the first Schafer report, $94,234 of that figure is taken from a Schafer summary of estimated revenues from "Drilled Non-Producing (Behind Pipe) Locations."

[7] The $259,861 figure for the Windle well is that which appeared in the D & M report. Counsel for defendants have submitted a $303,957 figure as well as a $413,722 computation for this well. The $303,957 figure is reached by adding back the portion of the capital expenditure deducted originally in the D & M report about which Ford of Trice later wrote Ketcham, suggesting that that deduction should be eliminated because certain wells, including the Windle well, had been completed since the date of the D & M report and the capital expenditure made. This Ford-to-Ketcham letter was dated August 27, 1960.

Counsel for defendants also have submitted a $413,722 estimate for the Windle well. This figure is reached by recomputing the D & M report figure on the basis of fractional interests used later

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Well	*D&M Estimate*	*1st Schafer Estimate*	*2nd Schafer Estimate*
Weatherford	102,028 [8]	None	None
Dennis	91,045 [9]	None	None
Nunez "A" #1	670,667	350,841)[10]	
		618,696)[10]	None
J. R. Clayton #2	4,193	37,230	None
Woodworth #1	95,871	406,912)[11]	
		43,009)[11]	$411,696
Harvey Jones #1	93,351	None	292,626
Swinney #5	23,954	57,646	58,451
Tipps #1	316,802	None	None
Hester #1	None	None	None
Dumas #1	None	None	None
Skiles #1	None	None	None
Vera Roney #2	None	None	None
Hughes #1	None	None	None

by Brown and Bednar in computing their estimates. Nevertheless, both the Brown and Bednar estimates referred to by counsel for defendants were revealed at dates substantially after August, 1960 (February, 1961 for Brown, and November, 1962 for Bednar), and the estimates by these individuals were substantially less than the D & M report figures ($320,299 gross, by Brown, and $50,569, by Bednar), despite the larger fractional interests involved. Bednar is an engineer who was employed by Bankers Trust, and later in 1962, by Hopkins, with regard to the Trice production payment purchased by those institutions.

[8] Counsel for defendants have submitted a $90,975 figure for the Weatherford. This figure is submitted along with the Windle recomputation and is also based on adding back a previously deducted capital expenditure and on a different fractional interest, this time smaller, utilized by Brown and Bednar.

[9] Counsel for defendants present a $128,445 figure for Dennis, which like Windle and Weatherford reflects a restoration of a capital expenditure based on the August 27, 1960, Ford-to-Ketcham letter.

[10] Of the total $969,537 estimated future net revenues for Nunez "A" 1 from the first Schafer report, $618,696 of that figure is taken from a Schafer summary of estimated revenues from "Drilled Non-Producing (Behind Pipe) Locations."

[11] Counsel for defendants have submitted the $411,696 figure from the second Schafer report. It should also be noted that the first Schafer report contained a $406,912 figure plus a $43,009 "behind pipe" computation.

7. Trice Production Co. mailed Trice Production Schedules II and III, dated August 7, 1960, to LaPiere. Schedule II showed, among other things, the following estimates of future net revenues:

Nunez A-1	$ 670,667
Jones	292,626
Woodworth	411,696
Dumas	265,541
Hester	478,704
Swinney	58,451
Hughes	79,513
Dollar	11,829
Dugger	72,858
Tipps	327,794
Weatherford	116,604
Windle	121,128
Skiles	53,958
Barham Knox	8,918
J. R. Clayton	4,193
Roney #2	16,518
Noland #2, #3, #4	124,897
Younger	50,473
Milne	361,223
R. D. MacDonald	1,699,536
Dennis	128,618

The total estimated future net revenue shown for the above 23 wells—those 23 wells which comprised the $1,300,000 production payment purchased by Hopkins—is $5,355,744. Schedule III is virtually the same as Schedule II, but it includes estimates for six additional properties—six "minor interest" properties which LaPiere asked Trice Production

Co. to strike from the schedule—and a total estimate for future net revenues of $5,367,523.

8. Trice Production Co. mailed to LaPiere a "Schedule I" dated August 7, 1960. That Schedule showed, among other things, the following for each of the 23 wells in the $1,300,000 production payment purchased by Hopkins:

Well	*Available Analyses*	*Sources of Extension and Reserves*
Nunez A-1	D & M	D & M
Jones	D & M Schafer	Schafer
Woodworth	D & M Schafer	Schafer
Dumas	None	TPC •
Hester	None	TPC •
Swinney	D & M, Schafer	Schafer
Hughes	None	TPC •
Dollar	D & M	D & M
Dugger	D & M, Schafer	Schafer
Tipps	D & M	D & M
Weatherford	D & M	D & M
Windle	D & M	D & M
Skiles	None	TPC •
Barham Knox	D & M	D & M
J. R. Clayton	D & M	D & M
Roney #1	None	TPC •
Noland #2, #3, #4	D & M	D & M
Younger	D & M	D & M
Milne	D & M	D & M
R. D. MacDonald	D & M	D & M
Dennis	D & M	D & M

• TPC—Trice Production Company

9. Trice Production Co. mailed to LaPiere the brochure dated August 8, 1960, entitled "Proposal for Purchase of Oil & Gas Production Payment." Among other things, this brochure included estimates of future net revenue for the same 29 wells covered by Schedule III, *supra,* (including the 23 covered by the $1,300,000 production payment pur-

chased by Hopkins), and this brochure shows a total future net revenue figure for the wells of $5,083,773.

10. On or about August 5, 1960, LaPiere asked Bankers Trust, through Ketcham, to finance a $2,500,000 Trice production payment, which Bankers turned down.

11. LaPiere then, on or about August 8, 1960, called Ketcham again and offered Bankers Trust a counter-proposal in which William Hutton agreed to reduce the amount of broker's loan which Hutton had from Bankers if Bankers agreed to take part in the Trice financing. Bankers decided to go ahead with this proposal.

12. In August, 1960, Ketcham of Bankers received from LaPiere a copy of the D & M report, the second Schafer report and the Trice Production Co. "Schedule II". Ketcham prepared a resume of the D & M report, and a schedule recapitulating net revenue figures from the D & M and first and second Schafer reports.

13. Bednar, a technical consultant to Bankers Trust, reviewed the D & M and Schafer reports and expressed to Ketcham his preference for the D & M estimates, rather than those of Schafer which seemed to Bednar to take the high road.

14. Ford, of Trice, wrote Ketcham, in a letter dated August 27, 1960, among other things, that certain variations existed between Trice figures and the D & M report estimates for the Weatherford #1, Lee Tipps #1, Bert Dennis #1 and Emma Windle #1 wells. Ford explained that the D & M estimates, which were made before the

Trice figures were assembled, were lower than the Trice figures because the D & M figures reflected a deduction of certain estimated capital expenditures; that the latter were not deducted for the Trice figures because subsequent to the date of the D & M report these four wells had been completed and those expenditures made.

15. Barnett of Trice wrote LaPiere a letter, dated August 25, 1960, which, among other things, described a possible sales pitch for putting together a syndicate to take a portion of the production payment deal, and informed LaPiere that he would receive a memo by Wood, of Peat, Marwick & Mitchell, with regard to the tax aspects of such a deal.

16. On August 30, 1960, LaPiere contacted Rowen, a partner in the law firm of Shearman, Sterling and Wright, of New York City, and asked Rowen to comment on the proposed $1,300,000 Trice production payment, especially with regard to tax matters. Rowen performed approximately 14 hours of work with regard to the Trice Production Co. matter.

17. Rowen received a letter, dated September 10, 1960, from McCauley of Trice, which letter explained that enclosed with it was a copy of a McCauley-to-LaPiere letter of the same date and a draft of a proposed production payment, which McCauley desired LaPiere and Rowen to discuss. Rowen talked with McCauley about this material in a phone call on September 15, 1960.

18. Rowen received from McCauley more production payment documents with a letter, dated October 4, 1960,

which letter stated McCauley's understanding that LaPiere had obtained a committal on approximately all of the $1,300,000 prouction payment, and that within the next few days the first production payment (to Bankers) would be concluded.

19. McCauley also communicated, by letter dated September 12, 1960, with counsel for Bankers Trust Company (Cahill, Gordon, Reindel & Ohl, of New York City) concerning documents covering the Bankers Trust part of the Trice production payment transaction. Among other things, McCauley expressed his view that the instruments were the usual provisions in transactions such as those proposed with Bankers Trust and the Gilbert LaPiere group.

20. Ketcham wrote a memo for the Bankers credit file dated September 16, 1960, which related that Constable of Bankers Trust had spent time with D & M and with Trice reviewing the D & M engineering work, and which stated that Bankers was waiting for a revised report on the Windle well and that Bankers had told LaPiere that Bankers would make the loan and would draw papers for an amount in excess of $1,300,000 and would advance additional funds as soon as satisfactory engineering determined a loan value for the Windle well.

21. Because of Bankers' dissatisfaction with the D & M report on the Windle well, Bankers asked Bednar to make a report on that well, and the Bednar report on Windle, dated September 27, 1960, stated among other things, a net revenue figure of $193,264.

22. Ketcham wrote to LaPiere, a letter dated September 28, 1960, in which he stated that Bankers desired to limit the amount of the production payment to $1,300,000 plus the loan value of the Windle lease, and that he expected Bednar's answer on the Windle in the very near future.

23. Constable wrote a memorandum to the Bankers credit file, dated October 14, 1960, in which he stated, among other things, that Bankers loaned on that date $1,375,000 to Oilco, Inc., Bankers' dummy corporation, for the purpose of purchasing the production payment, and that this financing was done at the request of LaPiere of W. E. Hutton for their customer, Cliff Trice of Trice Production Co.

24. LaPiere, by letter dated October 17, 1960, wrote to Ketcham and expressed his appreciation for the completion of the Bankers' oil payment deal, and enclosed a $75,000 check of W. E. Hutton Co. to open a new account with Bankers for W. E. Hutton's Oil and Gas Department.

25. Ketcham, in a credit file memo, dated October 18, 1960, stated, among other things, that the Hutton account was opened as a partial reward to Bankers for having purchased the $1,375,000 production payment.

26. Hutton received from Trice a $27,500 gross commission for placing this production payment; LaPiere received 40% of this commission payment, or $11,000.

27. By letter to Ragnar Naess dated August 30, 1960, Cliff Trice presented Trice Production Co. plans to sell

carved-out production payments in order to secure financing. In this letter, Trice stated, among other things, that LaPiere indicated Hutton's interest in securing monies for a production payment series amounting to $2,700,000 and that Trice agreed to pay Hutton a 2% finder's fee in connection with this sale; explained the mechanics of the production payment; and stated that the payments had been evaluated by the competent and conservative engineering firms of D & M and Schafer; explained Hutton's attempts to sell the $2,700,000 payment in two payments, one to a bank and another to a proposed syndicate; suggested the attractiveness of production payments as an institutional investment; asked Naess to recommend production payments to some of his clients; and enclosed a brochure, dated August 8, 1960, prepared in connection with the $2,700,000 production payment, which showed an estimated total future net revenue figure of $5,083,773.

28. On September 14, 1960, Cliff Trice and Gilbert LaPiere met with Ragnar Naess in the latter's office at which time Trice presented a production payment proposal concerning which he wanted to interest Naess' client, Johns Hopkins University; and during which meeting Naess spoke, by way of long distance, interstate telephone with his Baltimore partner, Canedy, and with Baker, the Treasurer of Hopkins, concerning the proposal, outlined the proposal to Baker and arranged for a meeting between Baker and Trice and LaPiere in Baltimore.

29. Thomas of Trice, by letter dated September 13, 1960, wrote to LaPiere a letter which included electric logs for four wells covered by the secondary production payment

and enclosed a brief summary in connection with the $2,700,000 production payment and asked LaPiere to get in touch with Trice Production Co. if he needed anything else that would assist him. The enclosed summary explained that the $5,083,773 estimated net revenue figure set forth in the brochure was a minimum figure compiled by independent engineering firms, and that additional data which had become available indicated that future revenue would amount to approximately $7,200,000.

30. Trice Production Co. sent to LaPiere's secretary a letter dated September 21, 1960, transmitting twelve copies of a brochure dated September 16, 1960, entitled "Proposal for Purchase of Oil and Gas Production Payment," and by letter, dated September 23, 1960, twelve additional copies of this September 16 brochure were sent to LaPiere, and another twenty copies were sent to LaPiere on October 4, 1960.

31. Naess also received a copy of this September 16, 1960, brochure.

32. This September 16, 1960, brochure included comments on the proposed $2,700,000 production payments and an outline of the economic results, and stated a total future net revenue figure of $6,560,000 with eight years said to be the time required to retire principal and interest on the $2,700,000 production payment, and estimated a return[12] of $2,905,174 to holders of the $1,300,000 production payment.

[12] When "return" is used in these findings, it is to be defined as the total proceeds that would be received under the production

33. Trice, LaPiere and Canedy attended a meeting in Baker's office on September 21, 1960, at which time Baker received a copy of the September 16, 1960, brochure containing the $6,560,000 net revenue figure and at which time he received the calling cards of Trice and LaPiere.

34. LaPiere received a letter, dated September 23, 1960, from Ford of Trice which stated that it included a schedule showing the "8/8 reserves" (estimated total production in barrels or gas units) for each of the 23 wells covered by the $2,700,000 production payment and suggested that this schedule be included in LaPiere's and Cliff Trice's copy of the brochure to talk from, but that it was felt that those reserve figures should not be made an inclusion in all of the brochures.

35. Canedy wrote to Naess and other Naess & Thomas officials a memo, dated September 22, 1960, in which, among other things, he mentioned the September 21 meeting in Baker's office, and in which he included a suggestion to Naess that Naess and Thomas find an expert to advise Hopkins on the deal and that Baker had agreed to compensate Naess & Thomas for the added expense of such a consultant.

36. After receiving this memo, Naess expressed his satisfaction with Canedy's suggestion to him, but stated that Hopkins, and not Naess & Thomas, should employ the consultant.

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payment, i.e., repayment of principal plus interest plus any override. When "interest" is used in this opinion in connection with any discussion or reference to the production payment purchased by Hopkins on March 1, 1961, it is a short-hand way of saying "an amount equivalent to interest".

37. In the first half of October, 1960, Naess had discussions with Baker in which he stated the advantages of the production payment and recommended that Hopkins employ Petroleum Consultants, Inc. to check the reserve estimates of D & M and Schafer on the wells included in the production payment which Hopkins was considering.

38. At the meeting of the Johns Hopkins University Finance Committee, on October 14, 1960, Baker outlined the production payment proposal, which the Committee decided not to pursue at that time, but which it indicated might be considered at a future date.

39. In October, 1960, Arthur Wiesenberger, a New York investment banker, wrote letters and enclosed therewith copies of the September 16, 1960, brochure, to at least five of his investment clients. The letters explained a possible Trice production payment program totalling $1,300,000 and stated that the production payment business had been brought to Wiesenberger by Gilbert LaPiere of W. E. Hutton & Co. None of Wiesenberger's clients purchased Trice production payments.

40. On October 4, 1960, Cliff Trice wrote to LaPiere at W. E. Hutton & Co., and stated to LaPiere that he had prepared (and enclosed) a list of possible participants for a production payment syndicate; that he was confident that with LaPiere's continued efforts they would be successful in selling production payments totalling $1,300,000; and that he deeply appreciated everything LaPiere had done for him and for Trice Production Co. The eleven names on the enclosed list of possible syndicate members were about evenly distributed between institutions and individuals.

41. During October, November and December, 1960, LaPiere and Trice negotiated with Bankers Trust for the sale of a $720,000 production payment to Oilco, which sale was ultimately made on January 6, 1961, and for which sale Hutton received a 2% commission, or $14,400, from which latter amount LaPiere received $3,600 (25% of the $14,400).

42. On November 25, 1960, the Johns Hopkins University Finance Committee issued a statement of its investment policy which, among other things, set forth a new position, namely, that in the fixed income portion of Hopkins' endowment portfolio (which portion comprised approximately 50% of that portfolio), there could be "up to 10% of portfolio in other investments" providing higher current return than from investments such as high-grade bonds or mortgages, and/or the probability of capital gain. The statement explained that such investments could include convertible bonds, leasebacks, oil payments, and certain other properties.

43. In November, 1960, I. W. Iglehart, a Registered Representative of Hutton, had phone discussions with his father-in-law, Charles F. Garland, the President of Hopkins' Board of Trustees, with regard to the disposition of Hopkins' Finance Committee toward the production payment proposal.

44. On December 7, 1960, Naess, during a meeting between Trice and himself, contacted Baker to ascertain if Johns Hopkins had any then present interest in the $1,300,000 production payment and also whether LaPiere

should appear before the Finance Committee on January 27, 1961. During this December 7, 1960, meeting Naess also learned that Trice would pay the cost of the University's independent oil consultant.

45. At its December 23, 1960, meeting the Johns Hopkins University Finance Committee again discussed the production payment proposal and at that time learned that Trice Production Co. was willing to pay the cost of the University's independent oil consultant. The Committee decided to discuss the production payment at its January 27, 1961 meeting at which Naess and a representative of W. E. Hutton & Co. were to be present.

46. By letter to Harriman of Naess & Thomas, dated January 4, 1961, LaPiere explained the nature of an oil payment of the type proposed to Hopkins; explained that the seller creates a payment from the properties in an amount equivalent to the financing the properties can support, in this case, $2,700,000; and stated that the amount that the properties can support is determined by independent engineers who had estimated the reserves and income on the properties.

47. By letter to Petroleum Consultants, Inc. dated January 5, 1961, LaPiere stated that W. E. Hutton & Co. and Trice Production Co. would like Petroleum Consultants, Inc. to make a study and to estimate future net oil and gas reserves and cash projections in connection with certain properties of Trice Production Co., and requested that work be started, if possible, on January 9, and that statements be sent to LaPiere at Hutton's address.

48. Harriman, by letter dated January 10, 1961, requested that LaPiere answer certain questions raised by Baker on the production payment deal, and stated that he believed a memorandum to Harriman containing these answers would make easier LaPiere's visit to the Finance Committee meeting on January 27.

49. LaPiere then called Worth McCauley, General Counsel of Trice and conveyed these questions to McCauley and requested that McCauley write the answers to these questions in a letter to LaPiere.

50. By letter, dated January 12, 1961, Worth McCauley replied to LaPiere's request in question-answer form.[13]

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[13] In the same paragraph (No. 2) of his affidavit dated December 10, 1964, in which he affies that he supplied LaPiere with answers by letter dated January 12, 1961, Worth McCauley, as a matter of background, stated:

> During the fall of 1960 and early months of 1961 I knew that efforts were being made by Trice Production Company to sell a package of two production payments in the aggregate amount of $2,700,000, of which it was contemplated that a part would be sold to a bank and a part would be sold to a single investor or a group of investors. I also knew that W. E. Hutton & Co., to act through Mr. Gilbert H. LaPiere, Manager of the Oil and Gas Department of that firm, had been retained on a commission basis to offer these production payments to a bank and investors and, if possible, negotiate and make the sale of them. As General Counsel for Trice Production Company, I participated in the preparation of documents necessary for consummation of the sale of a production payment for $1,375,000 to Oileo, Inc. in October 1960, which was a part of this proposal or package. I know that efforts were being made by the Trice Production Company through W. E. Hutton & Co. to have The Johns Hopkins University purchase the remaining $1,300,000 of this package. In January 1961 I received a telephone call from Mr. LaPiere telling me that a number of questions had been raised by Mr. Henry Baker, Treasurer of The Johns Hopkins University, and requesting me to write a letter to him (Mr. LaPiere) answering these questions which he stated to me over the telephone.

51. By letter, dated January 16, 1961, LaPiere replied to Harriman's January 10 request in question-answer form.[14]

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[14] This letter, written by LaPiere to Harriman, on W. E. Hutton Co. stationery, states as follows:

Mr. Mark Harriman
Naess & Thomas
Investment Counsel
2602 Mathieson Building
Baltimore 2, Maryland

Dear Mark:

In answer to the question which you have proposed relative to the John Hopkins proposed assignment of production payment and net profits overriding royalty interest, I wish to advise as follows:

As you know, Trice Production Company is a Delaware corporation with permits to do business in the States of Texas, Oklahoma, New Mexico, Louisiana, Arkansas, Colorado and Kansas. The principal place of business is Longview, Texas, where the home office is located; and the principal business of the corporation is that of exploring for, finding and marketing oil, gas and other hydrocarbons, and the operation of leasehold estates incident thereto (a leasehold estate being an interest in realty). Trice Production Company presently owns leasehold estates in the above states, some of which are producing properties, and it proposes to make an assignment of a production payment and net profits overriding royalty interest in and to these interests to John Hopkins University.

1. QUESTION: Concerning the buyer's interest, what are we buying exactly, a lien, a claim, a contract, an option, or what?

ANSWER: You are purchasing a production payment of so many dollars payable out of oil in place to be produced based upon reservoir engineer studies of what said properties will produce. This amounts to a conveyance of so much oil to produce the stated amount of dollars and to the extent of the dollars to be paid is an interest in realty.

In addition thereto, after stated number of dollars are returned a net profit amount will be paid from oil produced to repay an amount of interest; and until said amount of interest is repaid said net profit constitutes an overriding royalty interest to the extent of 50 per cent of the net profit realized from the sale of said oil. Thereafter, and after said two sums above stated have been received, there is a residual working interest which vests for the remainder of the life of the property which is an interest in the mineral estate.

52. The question-answer portion of the LaPiere-to-Harriman letter of January 16 was identical to the McCauley-

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QUESTION: What are the specific obligations of the seller of the payment, in this instance Trice?

ANSWER: The obligations of Trice as operator of the properties is to operate the properties as a reasonable prudent operator would operate them, which is assured by the fact that Trice retains an interest in and to said properties.

QUESTION: What can the buyer expect in terms of dollars or oil per year?

ANSWER: The buyer will get those returns in terms of dollars from oil produced as set forth in projection of production from reserves as arrived at by the buyer's independent reservoir engineer, i.e., the first estimates were made by DeGolyer & MacNaughton of Dallas, Texas and now being checked by Chester Brown who has completed his study of the properties in question and who is associated with the Petroleum Consultants, Inc. of New York City.

QUESTION: What happens to the agreement if allowable production is severely cut, etc.?

ANSWER: Should the allowable production be cut, the projected payout of dollars invested would be extended to the extent of the cut in allowables or restrictions on production. However, the oil is there and rapidity by which payout is had would be accelerated by either increasing allowables or an increase in the price of oil and/or gas and would likewise be delayed if allowables were cut.

QUESTION: From whom are we buying the payment?

ANSWER: You are buying the properties from Trice Production Company, the corporation above stated.

2. QUESTION: How exactly is an oil payment secured?

ANSWER: An oil payment is secured by an assignment which is placed of record and constitutes a conveyance, as provided by the terms therein, and to the extent therein provided is a sale of that amount of oil in place. It is in the same status as any other conveyance of realty.

QUESTION: What determines the life of the agreement?

ANSWER: The life of the agreement in this instance would be for the life of the leasehold estates under the stages and phases above set forth.

QUESTION: Can it be terminated; if so, how?

ANSWER: It is terminated by performance in that the production payment is paid, the interest is paid, the residual vests,

to-LaPiere January 12 correspondence, but for the additions noted below. Among other things, LaPiere stated

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and as previously stated it extends for the life of the property (in this case, that is, the net profits interest).

3. QUESTION: What are the properties and what do they consist of?

ANSWER: These are leasehold properties located in Texas, Louisiana, Oklahoma and New Mexico.

QUESTION: How long have the wells been in existence?

ANSWER: The wells in question have been in existence less than two years and are considered new properties.

QUESTION: What production is current?

ANSWER: I do not know exactly what is implied in this question; however, the engineer's report, namely, Chester Brown's will show the production history on these properties by past performance and in the present producing status.

QUESTION: Is there any insurance against disaster, fire, earthquakes, etc.?

ANSWER: There is no insurance against the catastrophies above stated; however, ample insurance is carried by Trice Production Company against liability for its operations of the properties and for underground damage in said operations.

QUESTION: What experts have been engaged by whom to do what?

ANSWER: The *only experts that have been engaged are DeGolyer & MacNaughton* who made the original estimate *and* now are being checked by *Chester Brown* who has been in Trice's office for some three days making a study of reserves and of said properties. [emphasis supplied]

4. QUESTION: What approximately are the figures on income, expenses, etc., for this particular deal?

ANSWER: The income projection has been set forth in a brochure heretofore furnished, it is substantiated by reservoir engineers' studies as above set forth, and the expenses will be borne by Trice Production Company in closing the deal.

QUESTION: Who are the partners and how does each rank in seniority?

ANSWER: There are no other partners participating in this deal, as it is a sole offering to John Hopkins.

5. QUESTION: Who is to be responsible for legal details, taxes, titles, etc.?

ANSWER: Taxes will be paid by the operator, Trice, as provided in the production payment and net profits overriding

that the buyer was purchasing a production payment of so many dollars payable out of oil to be produced and the then existing reservoir engineer studies of what said properties would produce (this statement was also contained in the McCauley letter); explained that the buyer would get returns in terms of net revenues from production as arrived at by the buyer's independent reservoir engineers; and stated that the first estimates had been made by D & M and were then being checked by Chester Brown of Petroleum Consultants, Inc. (see n. 14, question and answer 1; the McCauley letter to LaPiere included no mention of the earlier D & M estimates); that the *only* experts who had been engaged were D & M, who had made the original estimate, and Brown, who was presently checking such estimates (see n. 14, question and answer 3; the McCauley

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royalty interest. Titles have been examined by attorneys who have rendered title opinions based upon examination of records and abstracts. The preparation of papers will be made by an attorney designated by buyer working in conjunction with the Legal Department of Trice Production Company. Shearman & Sterling & Wright, W. E. Hutton & Co. counsel, has checked all titles and agreements to their satisfaction.

If there is further information desired, please do not hesitate to let me know.

Sincerely,

GHL

Gilbert H. LaPiere
Manager, Oil & Gas Department

GHL:GH
Enclosures

P. S. I thought I would also enclose the different instruments that have to be executed between John Hopkins and Trice Production Company so both you and Harry Baker can look them over before I get down there and if you have any questions before you can call Jim Rowen at Shearman, Sterling & Wright in New York City or Worth McCauley at Trice Production Company in Longview, Texas.

answer did not mention D & M); that Sherman, Sterling & Wright, counsel to W. E. Hutton & Co., had checked all titles and agreements to their satisfaction (see n. 14, question and answer 5; the McCauley answer did not include this reference to Sherman, Sterling & Wright).

53. The January 16 LaPiere-to-Harriman letter was forwarded by Harriman to Baker.

54. By letter dated January 24, 1961, Baker transmitted to members of the Finance Committee the LaPiere-to-Harriman January 16 letter, and the September 16 brochure, but the brochure was conveyed without the original cover page bearing the date September 16, 1960.

55. LaPiere attended that portion of the January 27, 1961, Johns Hopkins University Finance Committee meeting which related to the production payment.

56. At the January 27, 1961, Finance Committee meeting, Baker stated that based on D & M estimates of production Hopkins would receive during the first four years interest at 6% on funds invested and amortization of the principal in the total amount of about 3%; that during the next four years Hopkins would receive interest at 6% on the declining investment and return of the remainder of the principal of its original investment; that in the next approximately ten years Hopkins would receive profits from 50% of the production from the wells until a total of $641,000 had been received; and that after the above approximately eighteen years Hopkins would receive 25% of the net profits from these properties during their remaining lifetimes; and that the total receipts, in addition to

principal and interest at 6% thereon, were estimated to be $1,138,000. At this same meeting, LaPiere stated that the original D & M estimates with regard to the properties in question were now being checked by Brown of Petroleum Consultants who had been selected by Naess and whose fee would be paid by Trice Production Co. LaPiere further reported, among other things, that Brown's study indicated that the University might produce a total return of $3,005,000 instead of the original D & M estimate of $2,905,000, and that the difference in connection with those figures was due to Brown's estimate of $1,243,000 for the Residual Net Profits Interest—an increase of $100,000 over prior estimates for that interest; that Mr. Brown estimated interest and principal repayment in 6.6, rather than 8.8 years; that the proposed production payment properties included 17 oil wells and 6 gas wells, and that Hopkins would have a first lien on five of those 23 wells; that all estimates were based on then current prices for oil and gas; that at least 6% current interest was guaranteed to Hopkins, and that if production would not be sufficient to keep this current, other provisions would be made; and that other universities had substantial investments in oil payments, although not of this particular kind.

57. At its meeting of January 27, 1961, the Finance Committee of Johns Hopkins University approved the investment of $1,300,000 in the Trice production payment and approved an appropriation of $3,000 for expenses related thereto.

58. At the end of January, 1961, Baker called Cooper of Venable, Baetjer & Howard, counsel to Hopkins, and re-

quested him to look over certain papers regarding the production payment and to offer his comments to Baker.[15]

59. Cooper wrote a memo to the Venable, Baetjer & Howard file on the production payment, dated January 27, 1961, in which he commented on different aspects of the production payment deal and noted certain risks involved therein, but he did not give this memo to Baker.

60. Cooper, after he prepared the memo, called Baker and stated, among other things, that Hopkins should obtain the reports of D & M, Schafer, and Brown, and that it would be helpful if Hopkins would obtain the documents which Bankers Trust had used in connection with its production payment purchase from Trice.

61. After another request from Cooper to get the experts' reports, Baker, on February 6, 1961, telephoned LaPiere and requested that he send Baker the reports.

62. On or about February 2, 1961, LaPiere wrote to Cliff Trice that Johns Hopkins University had agreed to purchase the $1,300,000 production payment at the Finance Committee meeting on January 27, 1961; that Baker or his attorney would shortly contact Trice; and that Baker had instructed him that any questions which Trice might have should be directed to LaPiere at W. E. Hutton & Co.

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[15] Hutton raises the issue of the credibility of certain of the officials and advisors of Hopkins. Therefore, a question might be said to exist concerning the undisputed nature of those facts which rest on the oral testimony of officials or advisors of Hopkins, such as, for instance, Findings Nos. 58, 60 and 61. However, Mr. Wilson's affidavits show that Hutton itself seems to accept the truthfulness of each of such factual findings as are classified as undisputed in this opinion. In addition, none of such factual findings are essential to the holding in this case.

63. Baker received from LaPiere a letter, dated February 3, 1961, in which LaPiere stated, among other things, a summary of the Petroleum Consultants, Inc. report which included a total future net revenue figure of $7,394,000 and a return to the holder of the $1,300,000 production payment of $3,005,000, and in which LaPiere compared those figures with those in the September 16, 1960, brochure and stated that he was gratified to know that the figures presented in what he referred to in this letter as his brochure of September 16, 1960, were conservative.

64. At a meeting in Baltimore on February 7, 1961, attended by Baker, Dandridge of Venable, Baetjer & Howard and for a time by Cooper, and also by Worth McCauley and Mitchell of Trice, Mitchell gave to Baker a brochure dated February 3, 1961, entitled "Data Pertinent to Johns Hopkins Production Payment."

65. The February 3, 1961, brochure given by Mitchell to Baker stated, among other things, that some of the twenty-three wells included in the Johns Hopkins production payment had been evaluated by one consulting firm and some by another; that eight wells were evaluated by the engineering staff of Mercantile National Bank and explained the method by which the figures for the eight wells evaluated by Mercantile were calculated; stated that LaPiere had reviewed the technical data for each and every well and concluded that the reserves supporting this proposed production payment were conservative; and, that it was understood that Brown, as a result of his study, felt the reserves utilized in supporting the production payment were conservative. This brochure also showed the following list of net revenue figures and consultants for each well:

	Net Rev. to Trice Prod. Co.	*Reserves based on Following Consultants Reserves*
Nunez A #1	$ 672,465	D & M
Harry Jones #1	334,497	Schafer
Woodworth #1	516,111	Schafer
Swinney #1	104,674	Mercantile
Dollar #1	15,085	D & M
Dugger #1	196,676	D & M
Tipps #1	304,377	Mercantile
Weatherford #1	91,469	D & M
Windle #1	394,319	Mercantile
Barham-Knox #1	40,219	D & M
J. R. Clayton #2	36,062	Schafer
Noland #2, #3, #4	179,760	Schafer
Younger #1	32,833	Schafer
Milne #1	220,981	D & M
R. D. McDonald #1	2,041,979	D & M
Bert Dennis #1	123,757	D & M
Vera Roney #2	19,140	Mercantile
Dumas #1	385,500	Mercantile
Hughes #1	79,435	Mercantile
Skiles #1	47,525	Mercantile
Hester #1	723,136	Mercantile
	$6,560,000	

66. At the February 10, 1961, meeting of the Johns Hopkins University Finance Committee, it was reported, among other things, that Hopkins, through Venable, Baetjer & Howard, had retained the law firm of Carrington, Johnson & Stephens of Dallas, Texas for certain work with regard to the production payment purchase; that reserves for each of the wells had been analyzed first by either D & M, Schafer, or the Mercantile engineering staff, second by LaPiere of Hutton, and third by Brown of Petroleum Consultants (selected by the University's investment counsel to make a report); and that it was planned to have Naess make further investigations with Bankers Trust and to study the

Brown report, and then make recommendations to the University.

67. By letter to Baker dated February 14, 1961, Naess stated that Mercantile National Bank in Dallas held Cliff Trice in high regard; that he had found the assumptions in the Brown report to be reasonable; that he had spoken with Ketcham and had learned that Trice came highly recommended; that Constable of Bankers had spent some time going over the D & M reports, but had not personally made independent estimates; that the number of leases underlying the Bankers loan was less in number than those underlying the Hopkins loan; that Naess had known Trice for quite a few years and held him in high regard; and, that considering everything, Hopkins should purchase the production payment.

68. LaPiere received a letter from Baker dated February 14, 1961, with enclosures. In that letter Baker stated that he was enclosing excerpts from the Hopkins Finance Committee meetings of October 14, 1960, December 23, 1960, January 27, 1961, and February 10, 1961, having to do with Hopkins' proposed production payment purchase through LaPiere. Also, in that letter, Baker asked LaPiere to let him know if there was anything in those excerpts which indicated a different understanding on Hopkins' part than LaPiere and Trice Production Co. had in mind.[16]

[16] Baker has testified that LaPiere telephoned him on February 15, 1961, and stated that he thought the minutes were all correct. Baker also produced his file copy of his February 14 letter to LaPiere on which appeared a notation, dated February 15, 1961, and initialled by Baker, to the same effect as Baker's testimony. Because of questions of credibility, the Court does not include the substance of Baker's testimony and notation in these undisputed

69. By letter dated February 24, 1961, LaPiere conveyed to Baker a balance sheet as of November 30, 1960, and explained the Trice financial picture, and also stated that Hopkins would look to the oil and gas reserves for its guarantee, for no matter who operated the properties, Hopkins' call would be on the reserves.

70. At the February 24, 1961, meeting of the Johns Hopkins University Finance Committee, the Naess letter of February 14, 1961, recommending the purchase by Hopkins was read, mechanical details relating to expenses of the purchase were discussed, and the Treasurer (Baker) was authorized to make the investment which it was understood would be settled for by about March 1, 1961.

71. On March 1, 1961, the closing for the purchase by Johns Hopkins University of the $1,300,000 Trice production payment was held at the offices of Hopkins' Texas counsel. The production payment agreement between Hopkins and Trice is included in the record in this case.

72. Hopkins' Texas counsel, at about the time of settlement, received a letter from Trice Production Co. dated February 23, 1961, which stated, among other things, that Trice guaranteed 6% interest per annum on the unpaid monthly balance of $1,300,000 until the Oilco production payment would be liquidated and terminated; that Hopkins would be reimbursed for certain state income taxes and for the Dollar well, should it not go into production; and that that Trice undertaking was in consideration of Hopkins'

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findings of fact. At the same time, the Court notes that there is nothing in the record to suggest that any evidence might be produced at trial showing that LaPiere wrote an answer to Baker's letter, or that LaPiere did not respond orally in the manner Baker noted.

purchase of the production payment and net profit overriding royalty interests.

73. By letter to William Hutton of W. E. Hutton & Co. dated March 6, 1961, Cliff Trice stated his belief that Hutton had received Trice Production Co.'s $26,000 check for commissions on the $1,300,000 oil payment sale to Johns Hopkins University and expressed his appreciation to Hutton, W. E. Hutton & Co. and to LaPiere for helping Trice with its problems in converting short-term debt to long-term.

74. W. E. Hutton & Co. received a $26,000 check from Trice Production Co., dated March 7, 1961, and this check contained a description which stated that it was for a commission in connection with placement of Trice's $1,300,000 production payment with Johns Hopkins University by LaPiere.

75. Hutton's Customer's Ledger, "Prepaid Expense Trice Oil Payment Syndicate #1" itemizes as follows expenses totalling $5,479.80 which Hutton subtracted from the gross commission of $26,000 in order to arrive at a net commission of $20,520.20:

	Expenses incurred through Dec. 21, 1960	$1,933.31
1/24/61	Tel. Calls	126.72
1/26/61	Amer. Airlines	399.19
2/ 3/61	Hilton Credit	59.60
2/ 8/61	Tel. calls, Oil Dept.	229.79
2/14/61	G. LaPiere travel	16.70
2/21/61)	Pet. Cons. Inc. [$3,429.00	
3/ 8/61)	Minus Ck. Trice Prod. $1,714.50]	1,714.50
3/ 9/61	Fee paid to I. D. (sic) Iglehart oil commission	1,000.00
		$5,479.81

76. LaPiere was paid by Hutton 25% of the net from the $26,000 commission which Hutton received from Trice, so that after deductions for expenses, LaPiere received $5,130.05 in connection with the sale of the $1,300,000 production payment to Johns Hopkins University.

77. By letter to Pelley of Bankers Trust, with a copy to Ketcham, dated February 27, 1961, William Hutton stated that Hutton had been engaged through LaPiere in a refinancing program for Trice over the preceding four months; that in addition to the two prior production payments purchased by Bankers Trust, LaPiere had discussed a third deal involving approximately one million dollars, with Bankers; that Hutton was disappointed that Bankers did not wish to refinance the whole Trice picture; that Hutton continued to have confidence in Trice and would go forward in refinancing Trice; that it would be helpful to Hutton if Bankers would further consider the proposed one million dollar payment; and that Hutton would thus be allowed more time to direct its attention to other institutions to assist it in the overall financing.

78. Bankers refused to participate in further Trice financing because of irregularities found by Constable of Bankers on a visit to Trice on or about March 2 or 3, 1961, and Ketcham and others from Bankers communicated this decision to William Hutton at a meeting on March 9, 1961, at which meeting they also expressed warnings to Hutton to treat the Trice Production Company situation and LaPiere with great care.

79. During the years 1956-1962, partners and relatives of partners of W. E. Hutton & Co. invested over $1,000,000

in Trice Production Co. oil drilling programs, and clients and customers of W. E. Hutton & Co. invested over $2,000,000 in such programs.

80. After receiving a letter, dated March 28, 1961, from LaPiere requesting that he prepare a report for Trice and W. E. Hutton & Co. on certain wells with regard to a proposed new production payment, Brown prepared the report and billed Trice $6,865 for this work, half of which amount was paid by Hutton and half by Trice Production Co.

81. On April 11, 1961, Keusch and LaPiere of Hutton attended a meeting at which Trice presented to Bristol, financial advisor to Princeton University, a proposed production payment for sale to Princeton University, and at which meeting Bristol received a pamphlet, dated March 13, 1961, which described, among other things, Hutton's prior assistance to Trice in the sale of three production payments and Hutton's view of the advantages of a production payment investment. Princeton did not purchase this proposed production payment because of, among other reasons, an existing defect in Trice working capital.

82. Trice proposed a similar production payment to Guardian Life Insurance Co. and by letter to Trice dated May 31, 1961, LaPiere explained the delays in completing the proposed Princeton and Guardian purchases of payments and also a proposed University of Pennsylvania production payment purchase, as being caused by the necessity of taking time to indoctrinate financial officials of those institutions in the ways of oil payments.

83. In a letter to Trice dated June 15, 1961, LaPiere further explained Guardian's delay in making a purchase by

stating that it was necessary to educate Guardian on the principles of an oil payment which, as had been the case with Johns Hopkins University, would be a long tedious matter. Guardian ultimately did not purchase a Trice production payment.

84. LaPiere left the employ of W. E. Hutton & Co. in July, 1961.

85. After he left Hutton's employ, LaPiere, by letter to Trice dated July 19, 1961, described Hopkins' satisfaction at their payment purchase which "we" had presented.

86. By letter to McCauley dated April 12, 1961, Baker stated, among other things, that he understood Trice remittances to Hopkins were first to be credited to the interest due account, that the balance was to be applied to the principal account, and that Hopkins would at least receive the 6% interest payments.

87. By letter to Baker, dated April 19, 1961, McCauley confirmed Baker's understanding stated in the Baker-to-McCauley letter of April 12, 1961.

88. In reply to a letter dated August 3, 1961, from Patterson of Hopkins, Thomas of Trice by letter dated August 14, 1961, presented a schedule which showed that interest owed by Trice to Hopkins was in arrears by over $4,000 through April 25, 1961; and that by June 26, 1961, when interest was no longer in arrears, $569.19 of the payments made to Hopkins had been applied to reduction of principal.

89. By letter to Patterson dated September 18, 1961, Thomas stated that insufficiencies in interest designated on

a Trice schedule for April, May, June and August were due to the fact that several of the leases dedicated to the production payment had been underproduced due to a maritime strike, but that this underproduction would be made up in the future.

90. While Hopkins received slightly more than the $6,497.15 interest due to it for the period June 27, 1961, to July 26, 1961, it received almost $200 less than the $6,496.97 interest due it for the period July 27, 1961, to August 25, 1961.

91. With the exception of the period from November 27, 1961, to December 26, 1961 (when it did not receive more than $250 of the interest due it), Hopkins received between approximately $60 and $1500 more than the interest due it for each monthly period from August 26, 1961 to January 26, 1962.

92. As of December 31, 1961, Hopkins had not yet received any revenue from "Pone Gas Unit #1," and from the Dollar well (which had been plugged and abandoned since April 1961), two of the wells covered by its $1,300,000 production payment. Of the wells covered by this payment, nine were either underproducing or not producing as of this time.

93. On January 15, 1962, Trice Production Co. began to negotiate directly with Hopkins for the sale of a second production payment in the amount of $1,000,000.

94. During these negotiations Hopkins and Naess became aware of certain insufficiencies, some substantial, in Trice payments on the Bankers Trust production payment,

and that more wells in that payment had underproduced than overproduced. Trice's financial situation including the possibility of a Trice bankruptcy was also discussed.

95. Hopkins also became aware, during these negotiations, that the time of payment for both the Bankers and Hopkins production payments would be delayed six months beyond the time estimated for payout.

96. During this period of negotiations, Hopkins also received reports and information disclosing the need of Trice Production Co. for cash and revealing Trice Production Co.'s current assets to be between 3.1 and 3.2 million dollars, and current liabilities to range from approximately 7.7 to approximately 21 million dollars, the latter amount including approximately 13 million dollars in Trice Production Co. notes payable (which notes were represented as having a three-five year maturity period).

97. On February 14, 1962, Hopkins purchased the $1,000,000 production payment from Trice Production Co.[17]

98. From January 27, 1962 to June 26, 1962, Hopkins received amounts in excess of the interest due Hopkins on its $1,300,000 production payment for each of the five monthly accounting periods during this time. Those amounts ranged from approximately $430 to approximately $1900 in excess of the interest due Hopkins.

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[17] In this case Hopkins makes no claim on Hutton for any liability in connection with Hopkins' February 14, 1962 purchase from Trice. Indeed, Hutton does not seem to have acted in that transaction which was negotiated and consummated directly between Hopkins and Trice.

99. From February 26, 1962 to June 26, 1962, Hopkins received $1991.72 in revenue from its second, or $1,000,000, production payment, and on June 29, 1962, Hopkins received $26,147.06 on this payment.

100. In the first half of June, 1962, Hopkins received from Trice Production Co. two checks totalling in excess of $24,000, as payments on its first and second production payments, and both of these checks were returned for want of sufficient Trice funds after Hopkins had attempted to put them through for payment.

101. On July 13, 1962, Hopkins elected to have Trice Production Co. segregate the funds due Hopkins on the two production payments in an escrow bank account established for Hopkins, rather than implementing a procedure which would have had purchasers of oil and gas from wells covered by the Hopkins production payments make payment directly to Hopkins for their purchases attributable to wells underlying the Hopkins production payments.

102. In July, August and September, 1962, Hopkins was aware that the "Pone Gas Unit #1" of its first production payment, and that the Henry and Carpenter wells of its second production payment, were not then producing.

103. Hopkins was aware in October, 1962, that it had received no revenue from the Butler well of its second production payment.

104. At the July 13, 1962 Hopkins Finance Committee meeting it was reported that Hutton believed that Hopkins' investment was safe but that Hutton recommended that

Hopkins arrange for purchasers of production from wells covered by Hopkins' production payments to pay the purchase price for such production directly to Hopkins. At that meeting it was also disclosed the University's investment and legal counsel and Baker were disposed not to implement such a direct payment method at that time but to have Trice immediately deposit Hopkins' share of receipts into an escrow bank account.

105. For the five monthly accounting periods from June 27, 1962, to November 26, 1962, Hopkins received an amount equal to or more than the interest due on its first production payment for only one of those periods, and substantially less than the amount due to it in connection with that payment during the other five.

106. Hopkins received less than the amount of interest due it on its second production payment for monthly periods beginning July 1962 and ending October 1962.

107. Hopkins received no revenue for the months of July and August, 1962, from sales from the Hughes and Roney wells covered by its first production payment, and Hopkins was aware of this situation prior to the end of October, 1962.

108. Hopkins was named as a defendant in a suit brought by Strawn Drilling Co. against Trice on July 27, 1962, in which suit Strawn asserted a mechanics' lien for approximately $10,000 of drilling costs with respect to the Butler lease under Hopkins' second production payment; and for which Trice Production Co. agreed to pay the legal costs incurred by Hopkins in this suit.

109. Hopkins received a letter dated August 24, 1962, from a Mr. Loeb, an investor in one or more of Trice's ventures, who informed Hopkins of trouble he was having with regard to his investment in Trice programs, which among other things, included the return of Trice checks marked "No Funds."

110. Hopkins received a letter dated August 27, 1962, from its Texas counsel, which letter advised Hopkins, among other things, to watch the Trice situation closely.

111. On September 7, 1962, Hopkins learned from Hutton representatives that Cliff Trice had formed a finance committee with some of his creditors which would meet on September 10, 1962; that Hopkins should be represented at that meeting in order to protect itself; and that the possibility existed of certain Trice creditors forcing Trice Production Co. into a reorganization or bankruptcy.

112. After the September 10 meeting, Hopkins was informed by its Texas counsel, on September 12, 1962, that a committee of certain Trice Production Co. creditors had taken voting control of Trice Production Co. through a voting trust from Cliff Trice, and that the committee intended to cut down Trice expenses; that Hopkins should not be seated on the committee but should stay in close touch with it; and, that Trice would need approximately $1,000,000 to work out of its problems.

113. Hopkins received a Dun & Bradstreet Analytic Report, dated September 11, 1962, which stated, among other things, that a financial comimttee, composed of representatives of four major Trice suppliers, an attorney, and

three principal investors and/or directors of Trice had been formed; that Trice's financial condition appeared to be deteriorating, with heavy debt well in excess of worth; that suits were outstanding against Trice; and that at least one supplier was holding N.S.F. (not sufficient funds) checks.

114. At the Hopkins Finance Committee meeting on September 14, 1962, it was reported, among other things, that arrangements were then being completed for all purchasers of oil and gas from wells covered by Hopkins' production payments to implement the direct payment method; that a finance committee had been formed to improve the Trice financial position; that Hopkins had received all interest due it through July, 1962; that there would be delays in return of Hopkins' principal beyond original estimates because of late starts in runs to purchasers; that Hopkins was going to keep more detailed records with regard to each well and expected to get a new schedule from its oil consultant predicting the approximate times when it could look forward to receiving estimated principal repayments; and that, while the Trice investments were requiring a great deal of time to supervise, it was believed that they would work out satisfactorily for Hopkins and that the returns would justify the effort and risk.

115. On October 15, 1962, Patterson of Hopkins wrote to Helvenston, revenue accountant of Trice, and, among other things, requested that the latter explain the wide variations of revenue from individual wells under both production payments.

116. During the latter part of September and much of October, 1962, Hopkins received communications and correspondence advising it of the precariousness of Trice Production Co.'s financial situation, of various law suits brought against Trice, of an involuntary petition in bankruptcy filed against Trice, and of a petition filed by Trice for a Federal Bankruptcy Act Chapter X reorganization, this last communication being part of a Dun & Bradstreet report received by Baker on October 16, 1962.[18]

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[18] The narrative which follows, in this footnote, is taken from an affidavit of Henry S. Baker, dated February 13, 1967. This material has not been refuted. Nevertheless, the Court does not include it among its undisputed findings because Hutton has challenged Baker's credibility and because there has been no opportunity for Hutton to cross-examine Baker with regard to this material. At the same time, the following is included in this footnote in order to round out somewhat the narrative which unfolds in the undisputed findings of fact.

Baker's affidavit states the following: On November 6, 1962, representatives of Hopkins met with Pelley of Bankers Trust in Baltimore and discussed possibilities for protecting the production payments of Hopkins and Bankers Trust Co., and confirmed that Dandridge and Patterson of Hopkins would go to Dallas, Texas, to meet with Pelley and Stephens, so that they could further familiarize themselves with the Trice situation and ascertain what further steps should be taken to protect the University's investment. Patterson and Dandridge went to Dallas on November 7, 1962, and there Hopkins agreed to share with Bankers Trust the cost of having William Bednar check the physical condition of all the wells subject to the Hopkins and Trice production payments, and of having him make an up-to-date report on the oil and gas reserves subject to these production payments. In January, 1963, Hopkins received a report by Bednar, which showed the estimated future net revenues for the wells covered by the original Hopkins production payment to be less than as they were originally represented to the University.

The Bednar Report, marked for identification as Defendants' Exhibit 193 and received when the deposition of Chester L. Brown was taken October 7, 1964, states estimated production figures (for the wells covered by Hopkins' $1,300,000 production payment) which if considered in the light of production of those wells up to

117. By mid-December, 1962, the Hopkins Finance Committee had learned that it would probably not recover the full principal and interest on its production payments; that the Trustee of Trice Production Co. was seeking to have Trice creditors, participants, and production payment owners agree to remit, for a period of six months, 20% of the proceeds attributable to their respective interests to enable the Trustee to continue his operation of Trice Production Co.; and, that Hopkins had agreed to this arrangement on the condition that the other parties would so agree.

118. By signing, on January 16, 1963, a "Supplement to Assignments of Production Payment," Baker agreed for Hopkins, among other things, that approximately 20% rather than 10% of the proceeds attributable to Hopkins under its production payments would be payable to the Trustee of Trice Production Co. as payment for its conducting Trice operations; that Hopkins would be liable for certain expenses involved in the Trice operation, and the amount of such expenses incurred by Hopkins would be added on to the principal amount of Hopkins' production payment; that Hopkins waived its right to operate properties covered by its production payments; that Hopkins would have the power to veto unitization and abandonment

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that time, would result in ultimate total production substantially less than any of the prior total estimates presented to Hopkins prior to or after March 1, 1961. The Court places no reliance on anything contained in the Bednar report because it was not introduced in evidence, and because neither party has deposed Bednar or introduced any affidavit made by him. The above statements attributed to Bednar are noted only for the purpose of setting forth the alleged background in connection with Baker's affidavit of February 13, 1967.

decisions; and that this agreement would last for a period of six months.

119. Bankers Trust and its dummy corporation, Oilco, Inc., executed a substantially similar agreement in January of 1963.

120. Baker agreed for Hopkins to the unitization of the Dugger well, which was one of the wells underlying Hopkins' first production payment, with other wells in the Shamburger Lake Unit Field by executing, on January 22, 1963, a ratification agreement which ratified a Unit Agreement and Unit Operating Agreement which affected the unitization.

121. Another one of the wells covered by Hopkins' first production payment, the Nunez, was unitized with other wells in the Theall Field Unit, Louisiana, in April of 1962.

122. The Nunez well was abandoned in early 1963, and in the place of production from Nunez, Hopkins took production from other wells in the Theall Field Unit.

123. After a hearing, which Hopkins' representatives did not attend, an Oklahoma State Commission ordered that the Jones, Woodworth, Dumas and Hester wells covered by the March 1, 1961 payment would be unitized along with ninety-two other wells into the Joiner City Unit, effective May 1, 1965, and on May 19, 1965, Hopkins executed a document ratifying, adopting, and confirming division orders for the Joiner City Unit.

124. The Dollar well of Hopkins' first production payment was plugged and abandoned in April 1961. If Hop-

kins had timely made claim against Trice for recoupment of $1,500 under the terms of the Trice guarantee, Hopkins could have required Trice to pay that amount to it.

125. The Dennis well of Hopkins' first production payment was plugged and abandoned on January 29, 1962.

126. On July 1, 1965, the Clayton well of Hopkins' first production payment was plugged and abandoned.

127. The following is taken from one or more of the above 126 findings of fact:

SUMMARY OF CERTAIN OF THE OMISSIONS AND MISSTATEMENTS MADE BY LAPIERE TO HOPKINS

A. *Omissions by LaPiere*

1. D & M estimates for 18 wells totalling $4,021,860.

2. One set Schafer estimates covering 7 of the above referred to 18 wells and totalling $1,783,766; total D & M estimates for those same 7 wells was $1,003,251.

3. Another set of Schafer estimates covering 3 of the above referred to 18 wells and totalling $762,773; total D & M estimates for those same 3 wells was $213,176.

4. A Trice schedule dated August 7, 1960, stating a total estimated future net revenue figure of $5,355,744.

5. Another Trice schedule dated August 7, 1960, showing that the estimates were made solely by D & M for 14 wells, by both D & M and Schafer for 4 wells, and no available analyses for 5 wells.

6. A Trice brochure dated August 8, 1960, showing a total future net revenue figure of $5,083,773 for 29 wells, 23 of which were included in the production payment purchased by Hopkins on March 1, 1961.

B. *Misstatements by LaPiere*

1. By letter dated January 16, 1960, that the only experts that had been engaged were D & M, who had made the original estimates, and later Chester Brown.

2. By oral communication on January 27, 1961, that D & M estimated a return of $2,905,000 as Hopkins' share of the revenue to be produced from the 23 wells.

SUMMARY JUDGMENT

The core question before this Court is whether plaintiff is entitled, upon the undisputed facts, to summary judgment under Section 12(2) of the '33 Act. The answer to that question requires consideration of (1) Rule 56 of the Federal Rules of Civil Procedure, and (2) Section 12(2) of the '33 Act.[19]

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[19] Rule 56(c) provides in part:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e) states:

> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the

Opinion Dated August 15, 1968

After carefully reviewing the record in this case, this Court concludes under Rule 56 that there are undisputed facts which entitle Hopkins, as a matter of law, to the relief it seeks under Section 12(2). To be sure, many of Hopkins' claims of undisputed fact, in the amended complaint, in motions and in written and oral argument, cannot, in this Court's opinion be so classified when one examines the record in this case.[20] Such facts, not being undisputed, do not and cannot form any part of the basis of the grant of summary judgment herein. But, regardless of how a jury

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affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(f) provides:

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[20] For instance, Hopkins alleges that LaPiere selected Brown and withheld from him the fact that he was *Hopkins'* independent engineer, let him believe that he was an aid to the seller, i.e., Trice, and withheld full disclosure of material data in the D & M and Shafer reports. Hopkins would in effect depict LaPiere in this and in other contexts as an evil man. This Court rejects such allegations in connection with its consideration of Hopkins' motion for summary judgment in view of the existence of possible contrary inferences and questions of credibility involved in resolving them.

would dispose of those claims, and even if a jury were to find, upon special interrogatories, for instance, against Hopkins with regard to each and every one of Hopkins' said disputable factual contentions, the facts which in this case are undisputed would nevertheless require judgment, as a matter of law, for Hopkins. In this case no genuine issue, with regard to facts necessary and material to a decision under Section 12(2), remains for trial. As the Supreme Court stated in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962):

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed Rules Civ Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." [citation omitted, 368 U.S. at 468].

In *Poller*, a five-to-four decision, the Supreme Court reversed the grant of summary judgment by the District Court, and affirmance thereof by the Court of Appeals for the District of Columbia. The plaintiff, in *Poller*, charged that defendants had entered into an unlawful conspiracy to eliminate a radio station from the broadcasting field in Milwaukee. The question before the Supreme Court was whether plaintiff's treble damage suit, based on alleged Sherman Act violations, should have been disposed of by

granting defendants' motion for summary judgment. Writing for the majority, Mr. Justice Clark stated:

> . . . We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. [footnote and citations omitted]. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." [368 U.S. at 473].

Dissenting on behalf of himself, and Justices Frankfurter, Whittaker and Stewart, Mr. Justice Harlan, after noting the considerable amount of pre-trial discovery, wrote:

> This crucial issue, therefore, turns on proof of the respondents' motives. Had petitioner proceeded to trial and introduced no more evidence of motive than was revealed by the pretrial depositions and affidavits, the case, in my opinion, could not well have been permitted to go to the jury. There being no extrinsic evidence of an unlawful purpose, and CBS' executives having unequivocally denied any purpose to eliminate petitioner as a competitor, the jury would be left with no affirmative evidence of any intent to restrain trade. The possibility that the jury might disbelieve the re-

spondents' assertions of innocence is not enough to forestall the entry of summary judgment in their favor. [citation omitted].

Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles. . . . [368 U.S. 479-80].

The most recent pronouncement in depth by the Supreme Court concerning the use of Rule 56 is set forth in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), a five-to-three decision involving a civil antitrust treble damage action instituted eleven years before reaching the Supreme Court. Cities Service, one of the defendants, was granted summary judgment in the District Court because no genuine issue existed as to any material fact. The Second Circuit affirmed, as did the Supreme Court. The plaintiff bank complained not only of the alleged improper application of Rule 56 but also because, after eleven years, defendant Cities Service had not filed a formal answer, and because plaintiff had not been permitted sufficient discovery opporunities. Commenting on *Poller*, Mr. Justice Marshall, for the majority in *Cities Service*, wrote:

. . . This Court held [in Poller] that where there was substantial factual evidence tending to show the

existence of a conspiracy to eliminate a competitor and where the crucial question was motive, summary judgment was prematurely granted against the plaintiff, notwithstanding the fact that there was also substantial evidence tending to show the nonexistence of conspiratorial behavior.

At first glance the present case seems to present substantial similarities to the situation in *Poller* in that the issue as to Cities' motive in failing to conclude a deal with petitioner is likewise basic to the litigation here. However, there are crucial differences between the two cases. In *Poller* the competitive relationship between CBS and the plaintiff was such that it was plausible for the plaintiff to argue that CBS had embarked on a plan to drive him out of business. In this case, as Waldron has admitted right along, the business relationship between him, Cities, and the other defendants was such that it is much more plausible to believe that Cities' interests coincided, rather than conflicted, with those of petitioner. . . . [391 U.S. at 285].

Concluding his discussion of the summary judgment issue in *Cities Service,* Mr. Justice Marshall stated:

Rule 56(e) of the Federal Rules of Civil Procedure states that "when a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Petitioner contends that the lower courts misapplied Rule 56(e) in this case and erroneously placed the burden on him to show that there was a material issue of fact

for trial, rather than first requiring respondent Cities Service, the movant, to demonstrate the absence of a "genuine issue as to any material fact" under Rule 56(c). However, it should be noted that the decisions below did not purport to discuss burden of proof at all. Therefore petitioner must demonstrate that, regardless of what was specifically held, the effect of the decisions below was to so shift the burden of proof.

It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. The case at hand presents peculiar difficulties because the crucial issue of fact to petitioner's case is also an issue of law, namely the existence of a conspiracy. What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him. [footnote omitted]. Yet the analysis of the facts undertaken above demonstrates that, due to the absence of probative force of Cities' failure to deal with Waldron as being in itself evidence of conspiracy, petitioner's position is, in effect, that he is entitled to rest on the allegations of conspiracy contained in his pleadings. Thus petitioner repeatedly states that Cities has never disproved its participation in the alleged conspiracy, despite the fact that the only evi-

dence of such participation is his allegation that the failure to deal resulted from conspiracy.

Essentially all the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon which he relied to support his allegation were not susceptible to the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint. [391 U.S. at 288-290].

Mr. Justice Black's dissent in *Cities Service,* on behalf of himself, Mr. Chief Justice Warren and Mr. Justice Brennan, states that the majority's judgment therein "cannot possibly be reconciled with" *Poller,* and emphasizes disagreement with the grant of summary judgment against a plaintiff who was afforded "very limited" discovery opportunities over an eleven year period of litigation as contrasted with those which the defendant was permitted

to enjoy. (391 U.S. at 299-307). This latter problem is not present in this case, in which Hutton, opposing summary judgment, has been afforded every opportunity for discovery. Both sides have put this case through the wringer, over and over again, and all relevant evidence has seemingly been obtained, except from one key character in the drama, namely Gilbert LaPiere. Each side could well say that the other could have deposed, or otherwise discovered from, LaPiere, or perhaps have obtained an affidavit from him. The record reveals no reason to believe he is or was at any time unavailable for the taking of his depositon. But while no inference whatsoever is drawn by this Court against Hutton because it did not depose LaPiere, or otherwise discover from him, or obtain his affidavit, Hutton is not entitled to a denial of Hopkins' motion for summary judgment merely because LaPiere might be available to testify and controvert at trial any of the facts which are at this time undisputed on the record. Cf. *Cities Service, supra.*

The situation with regard to LaPiere is not too unlike that which existed in *Zachry* v. *O'Brien,* 378 F.2d 423 (10th Cir. 1967), where the Tenth Circuit affirmed summary judgment for plaintiff, in a construction subcontract action, insofar as issues of liability were concerned. In *Zachry,* the Court noted that two persons, defendant's superintendent and plaintiff's managing partner, had entered into a contractual arrangement; and that only the two of them had the required knowledge of the material facts necessary to resolve the one genuine issue in the case, i.e., whether defendant's superintendent had authority to bind defendant and what he had told or not told plaintiff's managing partner in this regard. The latter's deposition was taken. On the other hand, the defendant's superintendent

gave no testimony, either by depositon, interrogatories or affidavit, and was absent in South America (preparing a job for defendant) during the discovery period and also at the time of the summary judgment hearing. The Court, after noting the answer of one of defendant's officers to an interrogatory in which that officer stated that he was advised by defendant's superintendent that the latter was without authority to enter any contract on behalf of defendant, in effect held that such an answer does not meet Rule 56 standards and does not create a genuine factual dispute. The Court cited *Bumgarner* v. *Joe Brown Company, Inc.*, 376 F.2d 749 (10th Cir. 1967), *cert. dn'd.*, 389 U.S. 831 (1967),[21] in which it was stated:

> . . . Neither conclusionary allegations nor general denials perpetuate an issue of fact under Rule 56, and if such undisputed facts effectively pierce the sham of false generality of claims, the case is ripe for summary disposition. [citations omitted]. Nothing contained in *Poller* v. *Columbia Broadcasting System, Inc.*, [citation omitted] is to the contrary and appellants' [plaintiffs'] reliance thereon is misplaced. [376 F.2d at 750].

Despite the complex nature of this litigation, there is no "genuine issue" to be tried in order to accomplish "even handed justice" (See *Poller* v. *Columbia Broadcasting System*, 368 U.S. at 473), and no such issue arises as a result of the "conclusionary" allegations and denials contained in the pleadings and papers filed by defendants. In classi-

[21] In *Bumgarner*, plaintiffs' employees had claimed unpaid overtime under the Federal Fair Labor Standards Act. The District Court granted summary judgment for the defendant company and the Tenth Circuit affirmed.

fying certain facts as undisputed, and in refusing so to classify other facts, this Court has followed the dictates of the Supreme Court in *United States* v. *Diebold, Inc.*, 369 U.S. 654, at 655 (1962), and, in refusing to find certain facts to be undisputed, has drawn all possible factual inferences in favor of defendants. See also: *Phoenix Savings and Loan, Inc.* v. *Aetna Casualty & Surety Co.*, 381 F.2d 245 (4th Cir. 1967); *Pierce* v. *Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951). The facts which this Court is classifying in this opinion as undisputed are established almost entirely by documentary evidence or by non-hostile, non-party witnesses. Where an issue of credibility or of motive is involved or connected with any fact classified as undisputed, this Court is satisfied that the factor of credibility or of motive is minimal. Further, no fact classified as undisputed which is connected in any way with credibility or motive is in any way controlling. Cf. *Poller* v. *Columbia Broadcasting System, supra; Cram* v. *Sun Insurance Office, Ltd.*, 375 F.2d 670 (4th Cir. 1967).

Hutton's continued assertions that there are disputed facts does not make undisputed facts into disputed facts. In *Zoby* v. *American Fidelity Company*, 242 F.2d 76 (4th Cir. 1957), summary judgment granted by Judge Hoffman in a breach of contract action involving complicated facts was affirmed by the Fourth Circuit. On appeal the plaintiff-appellant contended, among other things, that there was a genuine issue of fact whether defendants had an economic interest in the subject matter of the suit, and that, assuming that they had such interest, there was a genuine issue of fact whether defendants' conduct was motivated by wrongful and fraudulent intentions. Noting this contention, Judge Sobeloff wrote in *Zoby*:

> . . . It is well settled, however, that to resist a motion for summary judgment, the party against whom it is sought must present some evidence to indicate that the facts are in dispute, where the moving party's evidence has shown otherwise; [footnote omitted] and as to the foregoing matters, the record reveals no such evidence. His bare contention that the issue is disputable will not suffice. [242 F.2d at 80].

In this case, Hutton's "bare contention" that there are disputed facts, no matter how often repeated, does not suffice to block summary judgment.

Prior to its decision in *Zoby* the Fourth Circuit had expressed its views numerous times with regard to the appropriate and inappropriate use of Rule 56. In *Stevens* v. *Howard D. Johnson Co.*, 181 F.2d 390 (4th Cir. 1950), plaintiff appealed from a summary judgment for defendant in an action to recover damages for breach of a rental contract. The Fourth Circuit held

> that there were substantial issues of fact in this case upon which plaintiff was entitled to trial by jury and that the summary judgment for defendant must be reversed and the case remanded for further proceedings not inconsistent herewith. [181 F.2d at 394].

In so holding, the Court stated:

> A number of questions arise, not only in connection with the breach of the contract, but also in connection with its proper interpretation and the damages recoverable for breach. These, however, should be decided in the light of the evidence which may be ad-

> duced upon a trial, not upon the affidavits presented on a motion to dismiss. It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment, authorized by rule 56 Federal Rules of Civil Procedure, 28 U.S.C.A., which in effect legalizes the "speaking" demurrer, has an important place in providing a prompt disposition of cases which have no possible merit and in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. [181 F.2d at 393-94].

The year following the *Stevens* decision, in *Pierce* v. *Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951), the Fourth Circuit considered the grant of summary judgment to defendant in a damage action resulting from the blowout of a tire on a new Ford automobile. In *Pierce,* like *Stevens,* the Fourth Circuit reversed and found that "substantial issues of fact [were] involved", and that "so far as can be judged from the pleadings, examinations and affidavits, they are issues that will have to be passed upon by a jury." Amplifying this statement, Chief Judge Parker wrote:

> From what we have said, it is clear that there were issues in the cases for a jury to decide, and it was error to enter summary judgments for defendant for that reason. It is only where it is perfectly clear that

> there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. [190 F.2d at 915].

Several years after its decision in *Zoby*, the Fourth Circuit discussed the use of summary judgment in *Clarke* v. *Montgomery Ward & Company, Inc.*, 298 F.2d 346 (4th Cir. 1962), in which the Court affirmed summary judgment for defendant in a malicious prosecution suit. After stating what it termed the "strict" standard of summary judgment applied in *Stevens* and *Pierce*, the Court held that the pleadings, depositions, admissions, and affidavits did not raise a material issue of fact as to the existence of probable cause for criminal prosecution, the basis of defendant's defense in that malicious prosecution action. Chief Judge Sobeloff stated that "what constitutes probable cause is a question of law for the judge to decide" and that "summary judgment may properly be entered if the facts which are undisputed make out the defense of probable cause." 298 F.2d at 348. Commenting upon a conclusory statement by plaintiff in an affidavit, Judge Sobeloff wrote that such a "bald allegation", did not raise a genuine issue in a summary judgment context. 298 F.2d at 349.

In *Williams* v. *Howard Johnson's Inc. of Washington*, 323 F.2d 102 (4th Cir. 1963), which was decided by the

Fourth Circuit a year after *Clarke,* the plaintiff, Williams, sought damages against the defendant restaurant, under certain civil rights statutes, alleging that defendant refused to serve Williams because he was a Negro. The plaintiff moved for summary judgment and the defendant cross-moved to dismiss the complaint. The District Court dismissed the complaint. On appeal, the Fourth Circuit noted that a good faith misunderstanding as to the nature of the hearing in the District Court had led to unpreparedness on the part of both counsel at the hearing in the District Court, and that there was question as to what part of the record was to be considered by the District Court. The Court of Appeals vacated the dismissal, rather than affirm or reverse, in order to give the parties an opportunity for a full hearing in the District Court on the merits after proper notice. With regard to summary judgment, Judge Sobeloff restated the "no genuine issue as to any material fact" standard and wrote:

> . . . Where the record is such that the court is in doubt, it has the discretion to postpone consideration of the motion for summary judgment until after a hearing on the merits. The principles governing summary judgment procedure should be applied in a common sense manner to the realities of the litigation at hand. Particularly is this true where the trial court is called upon to decide a constitutional question on summary judgment on a potentially inadequate factual presentation. [footnotes omitted, 323 F.2d at 105].

The factual presentation to the Court in the case at bar has been more than adequate to reveal that all facts material to a decision are not in dispute. Unlike the situation in *Williams,* it is clear here that the parties have been

properly notified, fully heard, and have been given every opportunity to complete the record.

Phoenix Savings and Loan, Inc. v. *Aetna Casualty & Surety Company,* 381 F.2d 245 (4th Cir. 1967), involved an action by a successor corporation against the insurer of its predecessor for losses alleged to have been suffered by the predecessor corporation because of fraudulent acts of the latter's officers, employees, agents and/or directors. The District Court granted summary judgment to the defendant insurer and concluded that the knowledge of the fraudulent nature of certain transactions on the part of certain persons who had substantially controlled the predecessor corporation had to be imputed to the plaintiff, and therefore the insurer should be discharged from any liability. The Fourth Circuit reversed, holding that the record disclosed that the question of whether the "three malefactors were employees or whether they had 'substantial control' of Phoenix, at all crucial times when the alleged frauds were perpetrated, is a question of fact in dispute between the parties." The Court noted that "a substantial doubt existed as to the actual amount of the various classes of common stock" owned by the alleged three malefactors. (381 F.2d at 250).

Writing for the Fourth Circuit, District Judge Simons stated:

> It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be

drawn therefrom, or if reasonable men might reach different conclusions. 3 Barron & Holtzoff, Federal Practice & Procedure §1234 (Rules ed. 1958). Burden is upon party moving for summary judgment to demonstrate clearly that there is no genuine issue of fact, and any doubt as to the existence of such an issue is resolved against him. 3 Barron & Holtzoff, Federal Practice & Procedure §1235 (Rules ed. 1958). [381 F.2d at 249].

Judge Simons cited *Kirkpatrick* v. *Consolidated Underwriters,* 227 F.2d 228 (4th Cir. 1955) and *Pierce* v. *Ford Motor Co., supra,* for the proposition that summary judgment "should be granted only when it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law"; and he cited *Cram* v. *Sun Insurance Office, Ltd.,* 375 F.2d 670, 674 (4th Cir. 1967) and *American Fidelity and Cas. Co.* v. *London & Edinburgh Ins. Co.,* 354 F.2d 214, 216 (4th Cir. 1965), for the proposition that, as stated in *Cram,* the "party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence." 375 F.2d at 674. In *American Fidelity* and in *Cram,* ambiguities in the respective contractual instruments therein in question required factual determinations. Near the end of its opinion in *Phoenix,* the Court stated that summary judgment was not the "proper method to dispose of the complex issues of this controversy, inasmuch as there are disputes or controversies as to the historic facts and the inference to be drawn therefrom." 381 F.2d at 252.

Less than a year after *Phoenix,* Judge Simons granted summary judgment for a defendant in an anti-trust action,

Ayers v. *Pastime Amusement Co.*, 283 F.Supp. 773 (D.C. S.C., Charleston Div., 1968). The history and record of that case bear striking similarity to the situation in this case. During the "ten year period" of the pendency of the *Ayers* case "numerous depositions, exhibits, and affidavits [had] . . . been filed by the parties, which indeed constitute[d] a voluminous record." In addition, "numerous motions [had] . . . been made and considered by the court, and orders entered which deal[t] with varied aspects of the litigation," 283 F.Supp. at 778-79.

In granting defendant's motion for summary judgment, the *Ayers* opinion notes that the plaintiffs did not offer enough evidence, either direct or circumstantial, of a conspiracy among defendant and others; that plaintiffs did not raise an issue of material fact as to lack of substantial competition between certain of its theatres and those of defendants; and that plaintiffs did not raise a sufficient issue as to the reasonableness of certain motion picture "clearances" granted defendant by certain film distributors or that such clearances were used pursuant to a conspiracy. The opinion also points out that certain affidavits and depositions presented by plaintiffs in opposition to the defendant's summary judgment motion were conclusory and were totally unsupported by recitation in them of any facts supporting such opinions.

In summarizing his view of the case, insofar as summary judgment is concerned, Judge Simons wrote:

> During the extended period of this litigation the parties have made full use of the discovery procedures granted under the Federal Rules. Depositions of most available witnesses have been taken, and countless exhibits and affidavits have been filed. Nevertheless,

> plaintiffs have failed in their efforts to make out a *prima facie* case against Pastime. Applying the guidelines established by Amended Rule 56 of the Federal Rules of Civil Procedure, it is concluded that plaintiffs have failed to raise a genuine issue of material fact sufficient to defeat Pastime's motion for summary judgment. The evidence construed most favorably in behalf of plaintiffs would require a directed verdict against them, and accordingly the Court should enter summary judgment for defendant in each action. [citations omitted]. A jury is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation. A mere scintilla of evidence is not enough to create an issue. There must be evidence upon which a jury may reasonably rely; and a party may not escape summary judgment on the mere hope that something will turn up at the trial. [283 F.Supp. at 792-93].

See also *Dressler* v. *M. V. Sandpiper,* 331 F.2d 130 (2nd Cir. 1964), in which Judge Irving R. Kaufman wrote that if the respondent "were permitted to avoid summary judgment", the attempt of summary judgment procedure "to screen out sham issues of fact would become devoid of practical significance", and "litigants would be enabled to postpone the inevitable to another day—precisely what summary judgment was intended to avoid." 331 F.2d at 133.[22]

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[22] In Robin Construction Company v. United States, 345 F.2d 610 (3rd Cir. 1965), Judge Freedman, writing for the Third Circuit, expressed similar but more detailed views of Rule 56, as follows:

> In Proctor v. Sagamore Big Game Club, 265 F.2d 196 (3 Cir. 1959), we affirmed the entry of summary judgment in

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In an earlier anti-trust action set in summary judgment context, *Bond Distributing Co.* v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963), the Fourth Circuit affirmed Chief

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favor of the defendant where plaintiffs failed to challenge the defendant's affidavits except to say that they "expect to prove facts" showing the existence of an agreement which they did not produce and that they had "a well-founded supposition" to support their claim. We quoted from the opinion of Clark, J., in Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2 Cir. 1943), that a party who resists summary judgment cannot hold back his evidence until the time of trial: " • • • [W]e have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment."

The purpose of summary judgment would be defeated if a party who has obtained by discovery and from affidavits information which he should seek to amplify or test by further discovery, merely rests on a statement of ignorance of the facts. Indeed, subdivision (f) of Rule 56, by affording an opportunity for continuance of an application for summary judgment so as to permit affidavits to be obtained or depositions to be taken or discovery to be had, indicates that absent such effort it is idle to attempt to shrug off the facts which his adversary has presented. As has often been pointed out, one who resists summary judgment but does not contradict the operative facts in his adversary's affidavit must utilize discovery, and suspicion alone without discovery is not enough. See Schneider v. McKesson & Robbins, Incorporated, 254 F.2d 827 (2 Cir. 1958). It is true that Rule 56(f) also authorizes the court in appropriate cases to refuse to enter summary judgment where the party opposing the motion shows a legitimate basis for his inability to present by affidavit the facts essential to justify his opposition; but to take advantage of this provision he must state by affidavit the reason for his inability to do so and these reasons must be genuine and convincing to the court rather than merely colorable. It is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts. In the world of speculation such doubts have an honored place, but in the daily affairs of mankind and the intensely practical business of litigation they are put aside as conjectural. In the words of Judge Learned Hand in De Luca v. Atlantic Refining Co., 176 F.2d 421, 423 (2 Cir. 1949), cert. denied 338 U.S. 943, 70 S.Ct. 423,

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Judge Thomsen's grant of summary judgment to defendant on an anti-trust count which was one of five counts in the complaint. In his opinion (32 F.R.D. 409 (D.Md. 1963))

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94 L.Ed. 581 (1950), where doubt was sought to be cast upon records on file in the office of the Secretary of State of New York relating to the appointment of the Secretary as agent for service of process on a foreign corporation: "True, it may be too strong to say that it is impossible to conjure up any conceivable answer to them. The original may have been forged; the authentication may be false; there may be a 'surrender of authority' on file which the custodian failed to find. But if a motion for summary judgment is to have any office whatever, it is to put an end to such frivolous possibilities when they are the only answer."

The allegation in the complaint of the agency or authority of those who committed the tort was met by the factual averments of the answers to interrogatories and the defendant's affidavit. The challenge which these facts call for if there is to be a genuine issue is not met by a simple reference to the complaint. The line of decisions of this Court which in the past permitted a litigant to be sheltered against summary judgment by the allegations of his pleading, no matter how much they may have been challenged by detailed and specific affidavits or disclosures in discovery, has been overthrown by the 1963 amendments to Rule 56. One of the amendments added two new sentences at the end of subdivision (e) of Rule 56: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." The Advisory Committee in proposing the amendment declared that its purpose was to "overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situa-

which the Fourth Circuit stated "should be read in connection" with its *Per Curiam* affirmance, Judge Thomsen stated that plaintiff's bare contention that an issue is disputable would not forestall a grant of summary judgment, and he then wrote with regard to *Poller, supra*:

> Although the Supreme Court in Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed2d 458, has recently stated that summary judgments are to be used sparingly in complex antitrust litigation where motive and intent play leading roles, this would seem to be an appropriate case for even a sparing use of summary procedures. [citations omitted, 32 F.R.D. at 415].

In *Walpert* v. *Bart, et al.*, 390 F.2d 877 (1968), the Fourth Circuit, in a *Per Curiam* Order, affirmed Judge Northrop's grant of summary judgment to defendants. 280 F.Supp. 1006 (D.Md. 1967). The complaint in that case purported to state a derivative cause of action under the '34 Act, and

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tion Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well-pleaded,' and not supposititious, conclusory, or ultimate. [citations omitted].

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

"It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment."

This amendment must be made fully effective.

charged the use of a false and misleading proxy statement.[22] Judge Northrop found that none of the affidavits submitted by plaintiff created any genuine issue of disputed material fact and that defendants had "produced impressive and numerous . . . affidavits and exhibits attesting to their version of the facts." 280 F.Supp. at 1011. Judge Northrop held that plaintiff was barred by laches. Then, after noting plaintiff's contention that summary judgment should not be granted under the views expressed by the Supreme Court in *Sartor* v. *Arkansas National Gas*, 321 U. S. 620, 628 (1941), because all of the affidavits relied upon by defendants were their own affidavits, Judge Northrop pointed out that plaintiff had the duty under Rule 56(e) "to show the court that at trial he will be able to produce some fact to shake the credibility of the affiants. Mere hopes are not

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[22] In *Walpert*, plaintiff's counsel submitted an affidavit in opposition to defendants' Rule 56 motion. Judge Northrop held (280 F.Supp. at 1010), that plaintiff's counsel had "failed to set forth that he had personal knowledge of the things set forth in his affidavit" and therefore, pursuant to Rule 56(e), granted defendants' motion to strike the affidavit. In the case at bar, Mr. John A. Wilson, Hutton's chief counsel, submitted, under Rule 56, a Main Affidavit (305 legal size pages) and a Supplemental Affidavit (143 legal size pages), affying *inter alia*, on the first page of the Main Affidavit:

> . . . I am one of counsel for defendants (Hutton). I am in charge of the defense of action and am familiar with the matters stated in this affidavit, and with all proceedings heretofore had herein.

Mr. Wilson included a similar opening statement in his Supplemental Affidavit. Hopkins moved to strike both Wilson Affidavits under Rule 56(e). The Court, during oral argument, stated that it would consider the Wilson Affidavits only as argument, and hereby reaffirms that position. The record clearly discloses that Mr. Wilson had no personal knowledge of the factual occurrences except those which occurred procedurally during the pendency of this case, and those latter facts are themselves disclosed by one or more parts of the record.

enough." 280 F.Supp. at 1013. See 6 J. Moore, Fed. Prac. ¶56.15[4] 2d ed. 1966.[24]

A review of the law of summary judgment convinces this Court that the grant of summary judgment for plaintiff is proper on the basis of the undisputed facts in this case.

> The same basic principles that apply generally to all actions . . . rule the grant or denial of summary judgment in the private . . . type of action [under the Securities Acts]. Only a word need be added. When there is no genuine issue of material fact underlying liability, an interlocutory summary judgment as to liability may be rendered although there is a genuine factual issue as to the amount of damages that necessitates an appropriate trial of damages. [6 Moore's Federal Practice (2d Ed.) Section 56.17 [54], Page 2667 under the heading: "Securities Act; Securities Exchange Act."].

As the Court must do in each individual action, this Court has determined that there is no triable issue of material

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[24] For some of the other recent Fourth Circuit cases involving summary judgment, *see* Harner v. McShain, 394 F.2d 480 (1968), in which the Court reversed a grant of summary judgment on the grounds that the failure of plaintiff to exercise due care was not the only permissible inference in that case; Nationwide Mut. Ins. Co. v. New Amsterdam Cas. Co., No. 10842 (April 3, 1967), in which the Court reversed the judgment below because the record raised a material disputed fact; Melchoirre v. California Canners and Growers, 394 F.2d 413 (1968), in which the facts were characterized as "scarcely in dispute" and in which summary judgment below for defendant was vacated and the case remanded for entry of summary judgment for plaintiff as to liability and for a new trial on the issue of damages; and Rogers v. United States, No. 11699 (May 20, 1968), in which summary judgment below was reversed.

fact in this particular case. Cf. *Byrnes* v. *Mutual Life Insurance Co.*, 217 F.2d 497, 501 (9th Cir. 1954). Furthermore, additional "inquiry into the facts is not desirable to clarify the application of the law" (*Zoby* v. *American Fidelity Co.*, 242 F.2d 76 (4th Cir. 1957)), since defendants, under the undisputed facts, cannot prevail in this case under any circumstances.

SECTION 12(2)

The legal conclusion reached in this case becomes inescapable upon analysis of the requirements of Section 12(2) of the '33 Act and upon application of the latter to the undisputed facts in this case. Hutton violated Section 12(2) if, as a broker, it offered or sold to Hopkins, a security as defined by Section 2(1) of the '33 Act, using the mails, or an instrument of, or communication in, interstate commerce to accomplish the same, by means of an untrue statement of material fact or by omitting to state a material fact necessary in order to render the statements Hutton made not misleading under the circumstances in which the statements were made; provided that Hopkins did not know of such untruth or omission, that Hutton knew, or in the exercise of reasonable care, could have known of such untruth or omission, and that Hopkins instituted this suit within the Section 13 limitations period. Hopkins' right to rescission rests on whether it has made a tender as required by Section 12(2) and is still in a position to consummate an exchange within such tender requirements.

Persons Liable

Hutton admits that Hopkins purchased the Trice production payment. Hutton contends that Hutton played a part, but only a minor part, in making the sale to Hopkins. The undisputed facts speak eloquently to the contrary. Hutton, through LaPiere, took a leading role both in offering and in selling Trice production payments to Bankers Trust Company and to Hopkins. For its part in bringing about Hopkins' March 1, 1961, purchase, Hutton received from Trice a 2% commission on $1,300,000, or $26,000. After deducting expenses (including Hutton's $1,714.50 portion of a fee paid to Petroleum Consultants, Inc. and a $1,000 commission to Iglehart), Hutton paid to LaPiere a commission of $5,130.05, or 25% of the net Trice commssion paid to Hutton. Beyond the shadow of any doubt Hutton, through LaPiere, was the selling or offering broker of the $1,300,000 production payment purchased by Hopkins. And as stated by Judge Magruder in *Cady* v. *Murphy,* 113 F.2d 988, 990 (1940), *cert. den.* 311 U.S. 705 (1940), Section "12(2) imposes a liability for misrepresentation not only upon principals, but also upon brokers when selling securities owned by other persons." *See also First Trust and Savings Bank* v. *Fidelity-Philadelphia Trust Co.,* 214 F.2d 320 (3rd Cir. 1954); III Loss, *Securities Regulation,* 1713 (2d ed. 1961). Hence, Hutton was a "person who offers or sells a security," within the language of Section 12(2), insofar as the transaction involving the production payment purchased by Hopkins on March 1, 1961 is concerned.

In two interrogatories posed to Hutton, Hopkins has asked first, whether LaPiere had "general authority" to write certain letters with regard to the sale of the $1,300,000

Trice production payment (Int. No. 19, 2d Set, Docket No. 33, Aug. 11, 1964), and second, whether he had such authority to make statements ascribed to him in the minutes of January 27, 1961, of the Hopkins Finance Committee (Int. No. No. 21, 2d Set, Docket No. 33, Aug. 11, 1964). Hutton's answers to these interrogatories were as follows:

> In connection with his general authority to find or assist in finding purchasers or prospective purchasers of oil production payments and to perform certain services incident to any sale of an oil production payment *such as those services indicated in defendants' Answer to Interrogatory 18 above,* LaPiere had general authority from defendant to write the letters ascribed to him in defendants' Answer to Plaintiff's Interrogatory 10 served on April 22, 1964 *in so far as there are no inaccuracies contained in said letters. As to such possible inaccuracies, defendants have no present knowledge except that reference is made in a letter, dated February 3, 1961, sent by LaPiere to Hopkins to: "my brochure of September 16, 1960." Defendants believe that reference may be misleading although not intentionally so. For, on information and belief, Trice prepared the brochure of September 16, 1960 and it or a copy thereof was delivered to Henry S. Baker, Treasurer of Hopkins, by Cliff W. Trice, on or about September 21, 1960 during a conference at Hopkins arranged by Ragnar Naess, of Naess & Thomas, Hopkins' investment consultants, who introduced Trice to Hopkins.*
>
> *Further, on information and belief, a copy of the same or substantially the same brochure was transmitted by Cliff W. Trice to Ragnar Naess and re-*

ceived by him with a letter from Cliff W. Trice to Ragnar Naess dated August 30, 1960. [Ans. to Int. 19, Dkt. 39, Sept. 29, 1964].

In connection with his general authority to find or assist in finding purchasers or prospective purchasers of oil production payments and to perform certain services incident to any sale of an oil production payment *such as those services indicated in defendants' Answer to Interrogatory 18 above,* LaPiere had general authority to make statements of the general character ascribed to him in the excerpts of the minutes of the meeting of the Finance Committee of Hopkins of January 27, 1961 *provided he used reasonable care in ascertaining the truth and completeness of such statements made by him, which defendants believe that he did.* But defendants have no knowledge of the accuracy of the statements as specifically ascribed to him by Hopkins in the excerpts of the minutes of the meeting of the Finance Committee of Hopkins January 27, 1961. [Ans. to Int. 21, Dkt. 39, Sept. 29, 1964].

The interrogatories, letters and services referred to in the above answers relate to the first Trice production payment purchased by Hopkins.

Hopkins objected to the underlined qualifying words in those answers as argumentative, and moved to strike them. This Court denied that motion. However, a principal cannot escape liability for his agent's "apparently authorized" acts simply because the agent tortiously without the authorization of the principal so to act and without the principal's knowledge. (Restatement, Agency, Second, §257 and Comment b thereto). This case is not unlike *Murphy* v. *Cady,*

30 F.Supp. 466 (D.C.Me., S.D. 1939), *aff'd sub. nom.* 113 F.2d 988 (1st Cir. 1940), *cert. dn'd.* 311 U.S. 705 (1940), where liability under Section 12(2) was imposed on defendants, fifteen in number, who constituted a brokerage firm, because of certain false material statements made by their head trader who was an employee and not a partner.[25]

This is not a case like *Kamen & Co.* v. *Paul H. Aschkar & Co.*, 382 F.2d 689 (9th Cir. 1967) *cert. granted*, 390 U.S. 942 (March 4, 1968), in which the Ninth Circuit reversed the District Court's holding of ostensible authority and quoted from and relied upon Restatement, Agency, Second, §258, Comment c for the proposition that "[a] principal is not liable in deceit for unauthorized representations made to a person who has reason to believe that they are not of the sort authorized. . . ." The facts in *Kamen* would seem to have called for the application of the principle enunciated in that Restatement Comment, for the Court stated as a fact that the purchaser did not act as a

> reasonably prudent person in concluding, and asserting his belief, that the purported agents were possessed with the ostensible authority to offer to him the transaction and promises which they did. The proposed guaranteed profit sales so far departed from propriety and were patently of a sufficiently unusual nature in the light of Aschkar's knowledge and expreience as to put him on warning and require him

[25] A reading of the opinion at 113 F.2d 988, *supra*, would seem to indicate that status of Lynch. Furthermore, the testimony set forth in the trial transcript (at pp. 119-20), which is included in the official First Circuit as well as the District Court files in that case, establishes beyond question the fact of Lynch's position as an employee.

> to take some steps to inquire into the extent of authority of the agent. We are constrained to hold that the finding that the agents had ostensible authority was clearly erroneous. We reverse. [386 F.2d at 696].

The Court made the above-quoted statement in holding that the defendant brokerage house was not liable for the acts of its employees under rules of common law agency.

Kamen, however, involved a second and additional issue in connection with which the Ninth Circuit sustained the refusal of the trial court—and dismissed plaintiff's cross-appeal from that refusal—to grant relief for violations of Section 12(2) of the '33 Act and certain sections of the '34 Act. With regard to Section 12(2), the Ninth Circuit, referring to Section 15 of the '33 Act and its '34 Act counterpart, stated in *Kamen* that no liability under 12(2) existed because the employer was not "a participant" in the fraudulent activities of the employees, nor did it have "any reasonable grounds for believing that such activity was taking place." 382 F.2d at 696-98.[16]

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[16] The Court stated in *Kamen* at 697:

> In support of the above contention, cross-appellant cites several cases where the employer was held liable for the acts of his employee where the particular activity was deemed non-delegable. Such cases may be valid propositions of law but they have no application to actions maintained under the Securities Acts. Aschkar sought relief under the Securities Act of 1933. Section 15 of the Act (15 U.S.C. § 77o), known as the "Controlling Persons" provision and applicable here, predicates liability upon the controlling person, "unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." We have already concurred with the trial court in its finding that Kamen was neither a participant, directly or indirectly, in the fraudulent activities of Ross and Grossinger nor did Kamen have any reasonable ground for believing such activities were

While this Court accepts the factual anaylsis set forth in Kamen, this Court respectfully does not believe that Section 15, relating to "controlling" persons applies to the employer (brokerage house)—employee relationship.

Section 15, as originally enacted in 1933, read as follows:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same person to whom such controlled person is liable. [15 U.S.C.A. §77o].

In 1934 the following words were added to Section 15:

> . . . unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist. [15 U.S.C.A. §77o].

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taking place. Kamen, concededly "a controlling person" is, however, not vicariously liable for the acts of the agent under the provisions of the Securities Act of 1933.

Relief was also sought under Sections 10 and 15 of the Securities Act of 1934 (15 U.S.C. §§ 78j and 78o) and rules promulgated thereunder. Like the Securities Act of 1933, the 1934 Act contains a "Controlling Persons" provision, Section 20 (15 U.S.C. §78t (a)). The test of liability there for the controlling person is that he must have acted in bad faith and directly or indirectly induced the conduct constituting a violation or cause of action. Kamen, as a controlling person, is not liable under this section for reasons already noted. [382 F.2d 697].

What legislative history there is does not indicate that Congress intended Section 15, originally or as amended, to serve as a limitation on liability.[37] The section would seem, on the other hand, to have been intended to establish a "controlling person" liability which would supplement, and extend beyond, common law principles of agency and *respondeat superior*. Insofar as the liability of a brokerage house for its employees is concerned, it is interesting to note that Mr. Justice (then Professor) Douglas, and Professor Bates, in their article, *The Federal Securities Act of 1933*, 43 Yale L.J. 171 (1933), discussed Section 15 in the context of the liability of issuers but in commenting on the liability of brokers made no mention of or reference to Section 15.

Nor do any of the cases, other than *Kamen*, in which Section 15 is mentioned, indicate in any way that Section 15, and more particularly the "unless" provision thereof, have any application to the liability of a brokerage house for acts of omissions of its employees. Rather, Section 15 has been applied in other contexts. For instance, *Whittaker* v. *Wall*, 266 F.2d 868 (8th Cir. 1955), imposed liability on a sales representative of an issuer corporation and on the president of that corporation; and *Hawkins* v. *Merrill Lynch et al.*, 85 F.Supp. 104, 123 (W.D. Ark. 1949),

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[37] *See* H. Rep. No. 152 on H.R. 5480 (Securities Act of 1933), 73d Cong., 1st Sess. 27 (1933); H.Rep. No. 1838 on H.R. 9323 (Securities Exchange Act of 1934), 73d Cong., 2d Sess. 37, 42 (1934); S.Rep. No. 792 on S. 3420 (Securities Exchange Act of 1934), 73d Cong., 2d Sess. 22 (1934); H. Rep. No. 1383 on H.R. 9323, 73d Cong., 2d Sess. 26 (1934). *See also* Brief for the S.E.C. as Amicus Curiae filed in *Kamen* in the Supreme Court, docket no. 4 (October term, 1968) at 13-17; Flexner, "The Fight on the Securities Act," *Atlantic Monthly* (February, 1934), in the *Congressional Record*, pp. 523-530 (January 12, 1934).

applied Section 15 and held Merrill, Lynch, et al. liable for activities of one of its Alabama "corespondents."

The legislative history and case law, to the extent there is any, would appear to buttress a construction of Section 15 to exclude application of the latter to an employment relationship. A contrary conclusion would in effect give blessing to a hear-no-evil, see-no-evil approach by partners of a brokerage house which is hardly in keeping with the remedial purposes of the '33 Act—purposes which the Congress and the courts have steadily stressed from 1933 to date.[28]

The facts in *Kamen* may well have been such as to preclude liability under 12(2), because the rather preposterous nature of the statements made to the purchaser (plaintiff) by the two employees of the brokerage house who engaged in the skulduggery was self-evident. But such is not the case herein. LaPiere's departure from the bounds of propriety were limited to material misstatements and material omissions. LaPiere was not engaged in selling the Brooklyn Bridge, or in a preposterous venture. Rather,

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[28] In Wilko v. Swan, 346 U. S. 427, 431 (1953), the Supreme Court wrote:

> In response to a Presidential message urging that there be added to the ancient rule of caveat emptor the further doctrine of "let the seller also beware," [7] Congress passed the Securities Act of 1933. Designed to protect investors,[8] the Act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale.[9] . . .

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[7] HR Rep No 85, 73d Cong, 1st Sess 2.

[8] S Rep No 47, 73d Cong, 1st Sess 1. See Oklahoma-Texas Trust v. Securities & Exchange Com. (CA10th) 100 F2d 888, 891.

[9] 48 Stat 74, Preamble; 48 Stat 77, 15 USC §77d. See A. C. Frost & Co. v. Coeur D'Alene Mines Corp. 312 US 38, 40, 85 L ed 500, 503, 61 S Ct 414.

he was promoting what seemed not only to Hopkins, but also to Bankers Trust, to be a reasonable opportunity to invest in a reputable company, i.e., Trice. In this connection, the undisputed facts in this case disclose that members of the Hutton family invested more than $1,000,000 in Trice's ventures during the 1957-1962 period.

If Hutton, as the defendant in this case, is not liable under Section 12(2) for the activities of LaPiere, the manager of its oil and gas department, because, as provided in Section 15, the Hutton partners "had no knowledge of or reasonable ground to believe in the existence of" the D & M and Schafer reports and of LaPiere's statements to, and omission to state to, Hopkins, then the partners in Hutton and in other brokerage houses like it can seemingly escape all liability under 12(2) by the simple expedient of making certain "not to know or have reasonable grounds to believe in the existence of the facts by reason of which the liability" of LaPiere or a person like him "is alleged to exist." Such a construction of Section 12(2) and 15 would in effect mean that the partners in a brokerage house who kept their eyes and ears closed to the fraudulent conduct of one of their registered representatives, could reap the harvest of that employee's conduct with impunity. Such a result would leave investors with much shallower protection than was intended by Congress in its passage of the '33 Act and the 1934 amendment to Section 15. Congress could hardly have intended to leave a defrauded investor with the impotent remedy of a 12(2) action against a relatively insubstantial employee when his employer-brokerage house would be invulnerable to suit. Congress, by the 1934 amendment to Section 15, did apparently intend to give a degree of protection to issuers or other selling parties for the wrongdoings of

other persons including wrongdoing brokers, but it certainly did not intend to limit a brokerage house's duty to supervise its employees to a passive role based on information which comes or should come to the attention of its partners. Assuming, as this Court does in this opinion, that the Hutton partners "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action" in this case, the '33 Act, nevertheless, in this Court's opinion, makes them responsible for LaPiere's acts and omissions. While this Court notes the absence of any contention by Hutton's counsel that the "unless" provision of Section 15 provides a defense for Hutton, this Court is herein treating the Section 15 question at length in view of the statements in *Kamen, supra*, particularly since those statements apparently form the basis for the petition for certiorari in *Kamen* and the grant of same by the Supreme Court.[39]

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[39] The following appears in 36 U.S.L.W. 3196 (November 7, 1967):

> Questions presented: (1) Does securities dealer have nondelegable duty to comply with provisions of Securities Act and Securities Exchange Act? (2) Did controlling persons provisions of Securities Act and Securities Exchange Act lessen duties and responsibilities imposed by common-law upon employers for their employees' fraudulent conduct?

In support of the petition for certiorari in *Kamen*, the Solicitor General, acting for the S.E.C. as amicus curiae, wrote (at pp. 7-8 of Memorandum filed January 17, 1968, in the Supreme Court):

> . . . It is the Commission's position that the *antifraud* sections relied on by petitioner render a broker-dealer liable for misrepresentations made by its employees in the course of their employment and that the exceptions in the special provisions operating *to extend* liability to "controlling persons" who otherwise would not be chargeable do not limit liability in cases such as this.

And after the grant of certiorari, the Solicitor General wrote (at p. 9 of his Brief filed May 23, 1968, in the Supreme Court):

Opinion Dated August 15, 1968

Inter-State

It is clear and undisputed that LaPiere utilized interstate telephone lines and interstate travel facilities as well as the mails in communicating with Hopkins with regard to the Trice production payment, and in making misrepresentations and omissions with regard thereto. Such conduct clearly constituted a "use of any means or instruments of transportation or communication in interstate commerce or of the mails . . ." as provided in Section 12(2) *MacClain* v. *Bules*, 275 F.2d 431 (8th Cir. 1960); *Blackwell* v. *Bentsen*, 206 F.2d 690 (5th Cir. 1953); *Schillner* v. *H. Vaughn Clarke & Co.*, 134 F.2d 875 (2d Cir. 1943). This is true even on the basis of the narrower interpretation of the provision in *Kemper* v. *Lohnes*, 173 F.2d 44 (7th Cir. 1944), requiring that the misrepresentations, or representations containing omissions, be themselves made via interstate facilities or the mails.

Security

There is no dispute as to the content of the production payment agreement between Hopkins and Trice. That agreement, entitled "Assignment of Production Payment and Net Profit Overriding Royalty Interest Dated February 23, 1961", has been submitted by both parties as an exhibit on this motion.

The "controlling-persons" provisions of the securities laws were not designed to deal with customary employer-employee relationships but to remove artificial barriers (by piercing the corporate veil or ignoring "dummy" instrumentalities) against liability of persons who may in fact have caused a violation. Hence, the standards adopted by those provisions are irrelevant to the civil liability of the broker-dealer firm for the frauds of its employees, committed within the scope of their employment.

Nevertheless, Hutton contends that Hopkins did not purchase a "security" within the meaning of Section 12(2). In so arguing, Hutton offered the following definition of production payment:

> A *production payment* . . . represents an interest in oil and gas reserves in the ground to be extracted from known wells. It is purchased for a lump sum in a single transaction. The seller-operator extracts the oil and gas from the ground and pays the proceeds over to the owner of the production payment. [*Hutton's Answering Brief in Opposition to Hopkins' Motion for Summary Judgment*, at footnote on Page 99].

In its consideration of whether the $1,300,000 production payment purchased by Hopkins constitutes a "security", this Court, for purposes of this motion, accepts the above statement set forth by Hutton.

Hopkins' production payment, giving to it an interest in certain oil and gas reserves to be extracted from the ground by Trice, is similar to the "investment contract" in citrus groves discussed by the Supreme Court in *S.E.C.* v. *Howey Co.*, 328 U.S. 293 (1946), involving an injunction action brought by the S.E.C. for violation of Section 12(1) of the '33 Act. In *Howey,* the Court held that a combination of a land sales contract and a service contract covering units of a citrus grove development constituted an "investment contract" which is one of the definitions of a "security" in Section 2(1) of the '33 Act. Under the sales contract the investors (largely individuals without skill in the citrus growing business) purchased plots of land containing citrus trees. Under the service contract the seller retained a leasehold interest in the plots and took charge

of cultivating and harvesting the land, marketing the production, and remitting the net proceeds to the investor.

In discussing that total arrangement Mr. Justice Murphy, for the Court, defined an "investment contract" to be

> a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Such a definition . . . permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H. Rep. No. 85, 73d Cong. 1st Sess. p. 11. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits. [328 U.S. 298-99].

In reversing the Fifth Circuit, the Supreme Court rejected the Circuit Court's suggestion

> that an investment contract is necessarily missing where the enterprise is not speculative or promotional in character and where the tangible interest which is sold has intrinsic value independent of the success of the enterprise as a whole. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial

> whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value. See Securities & Exch. Commission v. C. M. Joiner Leasing Corp. supra (320 U.S. 352, 88 L ed 93, 64 S. Ct. 120). The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae. [328 U.S. at 301].

In *S.E.C.* v. *C. M. Joiner Leasing Co.*, 320 U.S. 344 (1943), relied upon by the Court in *Howey*, the Supreme Court held that the sale of oil leasehold subdivisions by parcels, as part of a well-drilling undertaking, were sales of securities within the meaning of Section 2(1) of the '33 Act. The Court held that the case involved the sale of "investment contracts", if not undivided interests in oil and gas rights and leases, and that the '33 Act was remedial in nature and should be liberally construed. The Court recognized that the statutory terminology, "fractional undivided interest in oil, gas or other mineral rights", might well bear a narrow interpretation, and possibly not cover the type of interest involved in *Joiner*. Nevertheless, the Court emphasized that it did

> not think the draftsmen thereby immunized other forms of contracts and offerings which are proved as matter of fact to answer to such descriptive terms as "investment contracts" and "securities." [320 U.S. at 352].

And in reply to the point that the leasehold interests in the case were real estate interests, the Court stated that

> [i]n applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering. [320 U.S. at 352].

In *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967), the Supreme Court, in a unanimous opinion written by Mr. Chief Justice Warren, held "a withdrawable capital share in an Illinois savings and loan association" to be a security within the meaning of the '34 Act. Mr. Chief Justice Warren noted that Section 2(1) of the 1933 Act "contains a definition of security virtually identical to that contained in the 1934 Act" (389 U.S. at 335-36) and cited and relied upon *Joiner* and *Howey.* As the Court did in those cases, the Chief Justice again stressed the remedial policies underlying the Securities and Securities Exchange Acts, and emphasized the need, in considering the term security, to construe such remedial legislation "broadly to effectuate its purpose," and stated that in so doing "form should be disregarded for substance and the emphasis should be on economic reality." (389 U.S. at 336).

The broad remedial policies of the Securities Act would be defeated if this Court were to construe Hopkins' $1,300,000 production payment as anything but a security. Hopkins and Bankers Trust both purchased Trice production payments, each of which to a large extent covered identical wells. From their investments, each expected a return of its purchase price plus interest and in the case of Hopkins, additional profits as well. A reading of the production payment agreement (see especially Art. III, Subsection 1) reveals that, as a practical matter, this return would be derived solely from the efforts of Trice, which also retained an interest in a percentage of the reserves covered by the production payment agreement.

This is not a case like *Woodward* v. *Wright*, 266 F.2d 108 (1959), in which the Tenth Circuit held that although the interests involved were "fractional undivided interests in oil and gas," they were not "investment contracts" because the purchasers of the interests did not look to the management and efforts of others for a return of and on their investment. Rather, this "transaction contemplates the conduct of a business enterprise by others than the purchasers, the profits or proceeds of which the purchasers were to share." *S.E.C.* v. *Payne*, 35 F.Supp. 873, 878 (S.D. N.Y. 1940). The production payment transaction disclosed by the undisputed facts in this case may reveal the sale of an unusual kind of investment device. Nevertheless, this Court holds as a matter of law that the transaction in question involved the sale of an "investment contract" and therefore a security within the meaning of the Securities Act. In so holding, this Court follows the dictates of *Howey, supra*, 328 U. S. at 299, and applies "a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits." Cf. *Continental Marketing Corporation* v. *S.E.C.*, 387 F.2d 466, 471 (10th Cir. 1967). See also, *S.E.C.* v. *Crude Oil Corp. of America*, 93 F.2d 844 (7th Cir. 1937); *Blackwell* v. *Bentsen*, 206 F.2d 690 (5th Cir. 1953).

In contending that Hopkins' production payment was not a "security," defendants have depicted the production payment transaction as a " 'one shot' bilateral contractual arrangement." Hutton supports this characterization by urging that the particular package which Hopkins purchased was offered only to Hopkins. (*Hutton's Answering Brief in Opposition to Hopkins' Motion for Summary Judgment*, pp. 96-97). But this contention ignores the fact

that during the year prior to the purchase by Hopkins of its $1,300,000 production payment on March 1, 1961, a Trice production payment covering eighteen of the same wells included in Hopkins' production payment was purchased by Bankers Trust for $1,375,000 and another smaller production payment was purchased by Bankers Trust for $720,000. And almost a year after the closing for Hopkins' $1,300,000 production payment, Hopkins purchased a second production payment for $1,000,000. In addition, during this span of years, Trice, and sometimes Hutton, engaged in discussions with regard to possible sales of Trice production payments with certain other individuals and institutions. While a number of those discussions were conducted directly by Trice with prospective purchasers, it is to be noted that, insofar as the $1,300,000 production payment eventually purchased by Hopkins is concerned, at least forty-four copies of the September 16, 1960 Trice brochure, outlining that payment, were sent by Trice to LaPiere. Although this Court does not accept the argument that mere numbers should answer the question of what constitutes a "security," it does view the Trice program of financing through production payments as being of sufficient magnitude to entitle purchasers to the investor protections afforded by the Securities Act. That Trice also gave Hopkins a guarantee with regard to interest, in its letter dated February 23, 1961, does not alter the investment contract nature of Hopkins' $1,300,00 production payment agreement. Hopkins' clear intention, supported by the emphasis placed by LaPiere and Trice throughout this transaction, was that Hopkins was making an investment in oil and gas "reserves," which investment would return principal, interest, and additional profits to Hopkins. The Trice guarantee gave Hopkins additional rights, but it in no way

lessened the "security" character or investment objectives of the production payment. In *S.E.C.* v. *Payne*, 35 F.Supp. 873 (S.D.N.Y. 1940), the Court held that contracts for the sale and care of foxes which contained a guarantee as to minimum pup production and against certain types of damage, were investment contracts. Although the guarantee in *Payne* was of a more limited duration than that in this case, this Court holds that the guarantee by Trice does not alter the clear investment contract character of the production payment or make it into something other than a "security."

As the Supreme Court noted in *S.E.C.* v. *Joiner Leasing, supra*, 320 U.S. 350 at 351, the fact that the Hopkins' production payment is an "investment contract" does not exclude the possibility that it may also be a "fractional undivided interest in oil, gas or other mineral rights," see *Ouachita* v. *Willingham*, 179 F.Supp. 493 (W.D. Ark., Hot Springs Div. 1959),[30] or even a "profit sharing plan." See *S.E.C.* v. *Addison*, 194 F.Supp. 709 (N.D. Tex. 1961). In any event, it is clearly a "security" within the terms of Section 2(1) of the '33 Act.

Type of Investor

Hutton also argues that Hopkins is not the type of investor which the Federal Securities Acts are intended to

[30] *See* also Moses v. Michael, 292 F.2d 614 (5th Cir. 1961), in which a grant of summary judgment by the District Court for plaintiffs was affirmed. In that case, plaintiffs were assignees of undivided interests in oil and gas leases. No registration statement had been filed and the case was brought under Section 12(1) of the '33 Act. After discussing questions of whether the mails were used, and of whether a security within the meaning of 12(2) was involved, the Fifth Circuit found no genuine issue of material fact existed and resolved all legal questions in favor of the plaintiffs.

protect. But the cases are replete with instances in which sophisticated investors have been permitted to recover. And nothing in the '33 Act in its legislative history, or in the case law, suggests that a brokerage firm can withstand liability to an educational institution, whose Finance Committee was composed of leaders in the financial world with limited oil experience (or even with great oil experience), if the manager of the oil department of that brokerage house erroneously states, or omits to state, material facts concerning oil reserves underlying interests which that oil department manager, as an employee of the brokerage firm, takes part in selling to the educational institution.

Materiality and Misrepresentation

To recover under the '33 Act, Hopkins has the burden of proving that LaPiere misrepresented material facts or omitted to disclose material facts necessary to prevent LaPiere's statements from being misleading under the circumstances. The Summary, at page 52, *supra,* shows the material facts which, beyond any doubt, LaPiere knew, or should and could have known, from the information provided to him, and the material misstatements or omissions of this information which he made to Hopkins. This is true whether or not any importance is attached to LaPiere's use of the word "my" in his letter of February 3, 1961, to Baker with regard to the September 16, 1960 brochure. LaPiere, with all of the information and data available to him, had an affirmative duty to be certain that that brochure did not, when considered with all other information made available to Hopkins, misrepresent or omit material facts, regardless of the authorship of that brochure.

The misrepresentations and half-truths that LaPiere communicated to Hopkins are clear and undisputed. LaPiere's written communications speak for themselves. The minutes of the Hopkins Finance Committee, containing accounts of LaPiere's statements to the Committee, were submitted to LaPiere by Baker for LaPiere's check. Baker's notation on his file copy of his covering letter forwarding the submitted minutes to LaPiere indicates that LaPiere found those minutes to be accurate. Even if an attack is made on Baker's credibility, i.e., either that he falsified his notation when he made it in February 1961, or that he added it at a later date to make a case out against Hutton, LaPiere still had a duty under 12(2) to let Baker know if LaPiere knew of any material untruth or omission in the minutes. In fact, such a duty was imposed on LaPiere if, in the exercise of reasonable care, he should have known of any material untruth in or omission from the minutes. Indeed, Hutton does not offer or proffer or even allege that Hopkins ever was informed by LaPiere, through oral or written communication, of anything which would indicate that the said minutes contained any material untruth or omission. Hutton cannot avoid summary judgment and be permitted to go to a jury against the background of such a record.

The materiality of the untruths and omissions is clear. For instance, Wilson, in his Main Affidavit (at pp. 88-89)[31] states:

> . . . Hopkins' Finance Committee and its agents and representatives failed, in September 1960 and at all times prior to the purchase on March 1, 1961, to ob-

[31] This passage from the Wilson Affidavit also raises the question of whether Hopkins should have itself obtained the reports discussed therein. This issue is discussed *infra* at p. 103, *et seq.*

> tain and examine any of the reports and estimates made by DeGolyer & MacNaughton or Schafer Engineering. [footnotes omitted]. Had Hopkins done so, it would have been apparent, at the threshold, that DeGolyer & MacNaughton and Schafer Engineering had made no estimates of future net revenue for more than 20% of the 23 wells under Payment No. 1. Hopkins would then, undobtedly, have terminated further consideration of the purchase, forthwith.

This Court treats the Wilson Affidavits only as argument and therefore does not view any statements therein as admissions. Nevertheless, even treating the above only as a concession for purposes of argument in connection with the Thirteenth Defense or other defenses of Hutton, this Court finds that the statement does, at the very least, illustrate the materiality of the information possessed by LaPiere with regard to the various reports of estimates on wells covered by the production payment. Similarly, the other facts noted as misstated and omitted in the Summary, *supra,* are clearly material. This finding is bolstered by the fact that in considering a purchase for a Trice production payment covering eighteen of the wells included in the Hopkins $1,300,000 payment, Ketcham of Bankers Trust prepared a resume of information contained in the D & M and Schafer reports and also included similar information in a memorandum to the Bankers credit file. "An omission is material if the undisclosed information concerns 'matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered.'" *Demarco* v. *Edens,* 390 F.2d 836, 840 (2d Cir. 1968), citing 17 C.F.R. §230.405(1).

In *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 ((1957), the Second Circuit defined the materiality requirement, with regard to Rule 10b-5, on the basis of Restatement, Torts, §538(2)(a) as follows: "The basic test of materiality . . . is whether ' a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question.' " *See also*, III Loss, *Securities Regulation*, p. 1431 (2d ed. 1961). Clearly, the facts omitted and misrepresented by LaPiere are those which a reasonbly prudent investor would desire to know before purchasing the production payment, and which a reasonable man would consider important in deciding his course of action in the transaction.[32]

Hopkins alleges that there are other alleged omitted or misrepresented facts with regard to who selected Chester Brown, the latter's instructions when employed, and Brown's report, which allegations are sworn to by Brown. If Brown be believed, those facts would almost surely convince twenty bishops that Hutton violated Section 12(2). But because those alleged facts rest, to a not inconsiderable extent, upon Brown's credibility, this Court cannot and does not consider them in granting summary judgment. If there were not undisputed material facts in this case, unrelated to Brown, establishing material misrepresentations and omissions, this Court would consider the Brown issue as one which should go to the jury.

Scienter

The holding that Hutton through LaPiere violated Section 12(2) does not require the conclusion that LaPiere

[32] In S.E.C. v. Latta, 250 F.Supp. 170 (N.D.Cal. N.Div. 1965), the Court granted summary judgment, holding that defendant was misrepresenting and withholding material facts from investors, in violation of §17(a)(2) of the '33 Act.

was guilty of fraud in the common law sense or that he acted with any evil or improper motive. ". . . [I]t is not necessary [under Section 12(2)] for the vendee in maintaining an action for the recovery of consideration to prove that the vendor intended to deceive him as at common law. It is sufficient if the vendor did deceive the vendee even though the vendor had no such intent." *Pennsylvania Co. for Insurances, Etc.* v. *Deckert,* 123 F.2d 979, 985 (3d Cir. 1941).

In *Thiele* v. *Shields,* 131 F.Supp. 416 (S.D.N.Y. 1955), plaintiff brought an action under Section 17(a) of the '33 Act and Rule 10b-5 issued pursuant to Section 10b of the '34 Act, to rescind the purchase of certain municipal bonds made in reliance upon false and misleading matter. Defendants moved to dismiss, alleging, *inter alia,* that since Section 12(2) of the '33 Act is subject to a municipal bond exemption, it would be inconsistent to permit civil remedies under 17(a) and 10(b). In denying the motion, Judge Irving Kaufman, then a District Judge, highlighted the breadth of the standard with regard to defendants' state of mind under Section 12(2) when he wrote:

> . . . [T]he potential civil liability for *misrepresentations* under Section 12(2) appears to be much broader than that implied from Section 17(a)(2). All that a plaintiff-purchaser need prove under Section 12(2) is that a statement in a prospectus or oral communication is *in fact* false or is a misleading omission, and that he did not know of such untruth or omission. The section expressly provides that the defendant must "sustain the burden of proof that he did not know, *and in the exercise of reasonable care could not have known,* of such untruth or omission". (Italics sup-

plied.) On the other hand, Sections 17(a) and 10(b) (Rule X-10B-5) do not, on their face, purport to apply to a negligent misrepresentation nor, without an express provision as under 12(2), should they be construed to shift the burden of proving intention, knowledge, or negligence (if applicable) to the defendant. Cf. Fischman v. Raytheon Mfg. Co., 2 Cir., 1951, 188 F.2d 783, 786. But see First Trust & Savings Bank of Zanesville v. Fidelity-Philadelphia Trust Co., D.C. E.D.Pa. 1953, 112 F.Supp. 761, 770; Sections 10(b), 17 and 12. Therefore even assuming plaintiff's allegations are based *solely* on a "prospectus or oral communication" within the municipal bond exemption to the stringent liability imposed by Section 12(2), a claim under Sections 17(a) and 10(b) would still be sustainable if knowing or intentional misrepresentation with regard to municipal bonds were alleged (and proven) by the plaintiff. That Congress intended to exempt a seller of municipal bonds from liability for failure to prove that he exercised reasonable care in investigating the truth of a representation is not inconsistent with the subjection to civil liability of the same seller after the purchaser proves that he knowingly misrepresented a fact. Cf. Fischman v. Raytheon Mfg. Co., *supra.* [131 F.Supp. at 419-20].

In other words, the buyer under Section 12(2) does not have to prove that the seller had a subjectively evil state of mind in making false statements or omissions. Further, in order to avoid liability, if all of the other elements of a 12(2) cause of action exist, a seller must show that he did not know of the misstatements or omissions, or could not have known of them, in the exercise of reasonable care.

Woodward v. *Wright,* 266 F.2d 108, 116 (10th Cir. 1959); *see also Wilko* v. *Swan,* 346 U.S. 427, 431 (1953).

The standards of 12(2) are clear when it comes to ascertaining whether LaPiere's conduct is actionable. What did LaPiere know? What could he have known in the exercise of reasonable care? The undisputed facts speak loudly and clearly as to what information LaPiere had in his possession. There is no evidence in the record that LaPiere did not have, or that it would be possible to prove that he did not have, such information in his possession and that LaPiere did not know and could not have known with the exercise of reasonable diligence that he made material misstatements and material omissions in his communications to Hopkins. See *Murphy* v. *Cady, supra,* 30 F.Supp. 466 at 468; *Winter* v. *D.J. & M. Investment & Construction Corp.,* 185 F.Supp. 943, 947 (S.D.Cal. Cent'l. Div. 1960).

Purchaser's Knowledge

Similarly, Hopkins has shown that it is beyond dispute that it, the purchaser of the production payment, did not know of such untruth or omission. There is no dispute that Hopkins did not see the D & M and Schafer reports, and that Hopkins did not see the various tables and schedules, based in part on those reports, which were in LaPiere's possession. There is no dispute that Hopkins did not receive or obtain reports or estimates of independent engineers which would have revealed a net revenue total for the wells covered by its $1,300,000 production payment lower than the $6,560,000 figure projected to it in the September 16 brochure.

Hutton does allege that Naess, as an individual, and that Naess & Thomas, as a firm, knew of the August 1960

brochure and its $5,083,773 net reserve estimate, and that Naess therefore should have been put on guard when he and his firm received the September 16, 1960 brochure with the higher $6,560,000 figure. Assuming without holding that since Naess was Hopkins' investment counsellor for many years, any information known by Naess, or his firm, including information given to Naess in August, 1960, at a time when Trice and LaPiere were trying to get Naess to interest Naess' client, Hopkins, in the purchase of a Trice production payment, was information which is attributable to Hopkins, Hopkins still was never given any information indicating that the $6,560,000 figure was not entirely that of independent engineers. From the time LaPiere and Trice visited with Baker in Baltimore on September 21, 1960, at which time Baker received the September 16, 1960, brochure containing the $6,560,000 estimate, Hopkins received no further information other than that the figure was conservative and was fully justified by the reports of competent engineers. Furthermore, it was not until Baker received the February 3, 1961, brochure from Trice that Hopkins might have learned, though even through inaccurately reported estimates, that D & M and Schafer had not estimated all of the wells, and that Mercantile National Bank of Dallas had supplied the estimates for five of the wells. While that brochure, despite its estimate misrepresentations, may have conveyed a closer view of the basis for the $6,560,000 net revenue figure, it certainly cannot be considered a correction of the type that would obviate all prior misrepresentations and omissions with regard to the amount and basis of the estimates made to Hopkins. Cf. Loss, III *Securities Regulation*, 1703-04 (2d ed. 1961).

Hutton has contended that although Hopkins did not have certain information, such as the reports of D & M and Schafer, Hopkins could and should have obtained such information. Section 12(2), however, does not put upon the purchaser, a duty to investigate. Instead, the Securities Act "relieves the purchaser from the common law obligation of using reasonable prudence. . . ." *Murphy* v. *Cady, supra,* 30 F.Supp. 466 at 469. Cf. *Athas* v. *Day,* 161 F.Supp. 916, 918-19 (D.Colo. 1958). The language of Section 12(2) makes that clear when it uses the words "not knowing of such untruth or omission" with regard to the position the purchaser must have been in at the time of purchase in order later to sustain an action under 12(2). Those words assume additional importance when contrasted with the use of the words, "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission" which are the words used with respect to the position the seller must have been in at the time of purchase in order later to resist liability under Section 12(2). Congress, in enacting Section 12(2), put a burden on the seller to investigate but no such burden upon the buyer. See, Restatement of Torts, §538, Comment on Subsection 3:(k) and §540, with regard to absence of the purchaser's duty to investigate. See also Tentative Draft No. 11, April 15, 1965, of that Restatement on §540.

In *Dale* v. *Rosenfeld,* 229 F.2d 855 (2d Cir. 1956), the issue of duty to investigate arose. In that case the Court found that the prospectus in question misrepresented that an underwriter had agreed to undertake a "firm commitment" to underwrite when in fact it had only agreed to use its "best efforts" to sell certain shares. The Second Circuit held that the misrepresentation was a violation of Section 12(2). In response to the defendant's contention

that plaintiff had a duty to investigate, Judge Swan, for the Court, wrote:

> Nor can we accept the argument that the statement in the prospectus that "A copy of the Underwriting Agreement may be examined at the offices of the Underwriter" imposes on a purchaser the necessity of examining it to see whether it may supply information the omission of which made the prospectus misleading. Nothing in the words of the prospectus suggested such necessity. If an issuer or underwriter could so simply avoid the risk of a misleading prospectus, the legislative purpose of requiring full disclosure would be defeated and the statute would have little utility.[5] Availability elsewhere of truthful information cannot excuse untruths or misleading omissions in the prospectus. "Readiness and willingness to disclose are not equivalent to disclosure."[6]

This is not a case like *Ouachita Industries, Inc.* v. *Willingham, supra,* 179 F.Supp. 493, in which the Court found that the plaintiff had examined all of the records pertinent to the oil interest which plaintiff was purchasing, and that the plaintiff "knew prior to the execution of the assignment . . . the true status of the property of defendants' partnership." (179 F.Supp. at 506.) In the case at bar, even though Naess had purchased interests in, and/or had acquired knowledge of, Trice oil ventures prior to September, 1960, including the Trice production payment which

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[5] Cf. Wilko v. Swan, 346 U.S. 427, 431, 74 S.Ct. 182, 98 L.Ed. 168.

[6] Hughes v. Securities and Exchange Commission, 85 U.S. App.D.C. 56, 174 F.2d 969, 976; see also Kaiser-Frazer Corp. v. Otis & Co., 2 Cir., 195 F.2d 838, 843-844 . . . . [229 F.2d at 858].

Hopkins purchased in March 1961, and even if it is assumed that Naess and anyone connected with his firm are the same as officers of Hopkins, still neither Naess nor anyone connected with his firm, nor anyone in the Hopkins group, ever was given the D & M or Schafer reports, or the Trice schedules—the key pieces of information relating to the reserve estimates communicated to Hopkins. At the suggestion of Hopkins' legal counsel, Baker asked LaPiere for these reports. LaPiere did not supply them to Hopkins, nor did Hopkins see them prior to a year before the commencement of this action. Hutton is not relieved of liability because Hopkins did not press LaPiere harder to produce the reports as requested. On the contrary, LaPiere's failure to do so constituted another material omission.

The Thirteenth Defense of Hutton would attempt to bar Hopkins on the basis of Hopkins having contributed by its own negligence to its failure to uncover whatever, if any, misstatements or omissions were made by LaPiere. The defenses of contributory negligence or of assumption of risk, however, are not available to a defendant at common law with regard to actions of deceit, and certainly are not available to a defendant under Section 12(2) of the '33 Act. In fact, as discussed *infra*, the only defense under Section 12(2) based specifically on the conduct of the plaintiff is that plaintiff did have knowledge of the untruth or omission. Having induced Hopkins to buy and having made material misstatements and omissions, Hutton clearly cannot be permitted in this case to defend by saying that the other information which Hopkins received, or the speculative nature of the transaction, adds up to Hopkins having known of the untruths or omissions.

Reliance

Furthermore, reliance need not be proved by the plaintiff in order to maintain an action under Section 12(2). *Demarco* v. *Edens*, 390 F.2d 836, 841 (2d Cir. 1968); *Athas* v. *Day*, 161 F.Supp. 916, 918-19 (D.Colo. 1958); III Loss, *Securities Regulation* 1702-03, 1705-06, n.72 (2d ed. 1961).

> . . . The Congress intended . . . to "throw the burden of disproving responsibility for reprehensible acts of omission or commission on those who purport to issue statements for the public's reliance" [citation omitted]; and it did not impose the burden of proving reliance on the false statement as a condition of recovery. [*Woodward* v. *Wright*, 266 F.2d 108 at 116 (10th Cir. 1959)].

The absence of reliance as an element of a 12(2) case clearly makes such a case more susceptible to disposition by summary judgment.

In *Rogen* v. *Ilikon Corp.*, 361 F.2d 260 (1st Cir. 1966), plaintiff sued defendant corporation and others under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, claiming that as a result of a concealment of material facts he sustained damages in the sale to defendant corporation of stock he had held in that corporation. The District Court granted a motion by defendants for summary judgment on the grounds that there was not, taking the evidence most favorably to plaintiff, any material misrepresentation or non-disclosure and that there was no reliance by plaintiff on such non-disclosure. The First Circuit reversed, holding that a trier of the facts could have found, on the evidence most favorable to plaintiff, both material non-disclosure by defendants and reli-

ance thereon by plaintiff. In so doing, the Court commented:

> We doubt that a case such as this is ordinarily well adapted to disposition on summary judgment procedure. The delicate field of fiduciary relationships where the import of non-action must be assessed in the light of surrounding circumstances may well indicate a preference for the antennae of the fact finder over the cruder instrument of summary judgment. In any event, a period of almost four years is hardly "summary". Nevertheless, we reverse reluctantly. We are cognizant at the time and effort invested by the parties, counsel, and the court. We are impressed by the marshalling of facts and argument in the district court's opinion. But the standard of review is a rigorous one and not even one chink in the armor of decision can be vulnerable to the question: taking the facts and inferences most favorable to the losing party, would a trier of fact nevertheless have to find against him? [footnote omitted, 361 F.2d at 265-266].

Unlike *Rogen*, this case, brought under Section 12(2) of the '33 Act, does not involve the issue of reliance and the varying factual inferences which the element of reliance often raises. *Woodward* v. *Wright*, 266 F.2d 108, 116 (10th Cir. 1959). In the case at bar, plaintiff need only show that it did not know of the misstatement or omission upon which it bases the within 12(2) action. *Athas* v. *Day*, 161 F.Supp. 916, 918-19 (D.Colo. 1958). In further contrast to *Rogen*, in this case, as discussed above, it is clear that the misstatements or omissions were material because a jury could only find that reasonable men in plaintiff's position would, in determining whether to purchase the

production payments, have attached importance to the fact that the D & M and Schafer estimates overlapped and, in at least some instances, presented vastly different reserve estimates for the same well.

Limitations

While Section 12(2) "does not require that the innocent, *before* entering into the transaction, use due diligence to inevstigate the facts misrepresented by the defrauder," Section 13 of the '33 Act, setting forth the statute of limitations applicable to Section 12(2), does require "that reasonable diligence be used toward discovering the fraud *after* the transaction is completed." *Rosenberg* v. *Hano*, 121 F.2d 818, 821 (3d Cir. 1941). (emphasis supplied). See also Section 13 of the '33 Act, *supra*.

In this case, there is not one word in all of the pleadings, affidavits and discovery materials, other than the bare assertions of Hutton, to support a finding that prior to November 1, 1962, Hopkins, "by the exercise of reasonable diligence," could or should have discovered LaPiere's untruths and omissions. Indeed, prior to that date, the undisputed facts reveal that plaintiff was not "possessed of sufficient information to reveal" an even partial glimpse of the false and misleading nature of LaPiere's communications, let alone the "entire picture" of his misrepresentations. Cf. *Gould* v. *Tricon Inc.*, Fed. Sec. L.Rep. ¶91,949 (S.D.N.Y., June 9, 1967).

In *Azalea Meats Inc* v. *Muscat*, 386 F.2d 5 (1967), the Fifth Circuit warned, in the context of the applicability of a state statute of limitations in a Section 10b-5 action:

> Inevitably the factual issue of due diligence involves, to some extent at least, the state of mind of the per-

son whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment. In the landmark case of Alabama Great Southern RR. Co. v. Louisville and Nashville RR., 224 F.2d 1, 50 A.L.R.2d 1302 (5th Cir. 1955), Judge Hutcheson, as the organ of the court, wrote: "• • • where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, an examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment."

Although appellees vigorously insist that appellant's own testimony convicted it of a lack of due diligence, nevertheless there are facts in the record, and appellant assures us there will be more, which indicate that appellant in fact relied upon misrepresentations made by appellees and that its failure to file its suit prior to September 29, 1964, resulted from these untruths rather than from a lack of due diligence on its part. [386 F.2d at 10].

In *Azalea,* the Fifth Circuit reversed summary judgment below for defendant-seller, holding that there were facts in the record which could have, with regard to the limitations issue, sustained a finding of the exercise of due diligence by plaintiff-purchaser. In *Azalea,* the Court found that facts had to be developed with regard to whether certain of defendants stood in a confidential relationship with plaintiff and, if so, the impact of such relationship on plaintiff's duty to exercise due diligence. (386 F.2d at 9). While the language in *Azalea* is strong in its reversal of summary judgment, the decision must be read in the light of the facts of that case. For Rule 56 "permits

summary judgment in any case [where there is a lack of any genuine issue of material fact], and the inquiry must be whether such a judgment is appropriate in the particular case, a question which cannot be resolved by some broad judicial gloss on the rule." Wright, *Federal Courts,* §99, p. 387 (1963).

In *Morris* v. *Feldman,* Fed.Sec.L.Rep. ¶91, 427 (S.D.N.Y. 1964), Judge Tenny denied plaintiff's motion for summary judgment on the basis of the existence of a disputed question of fact with regard to whether purchasers of securities, seeking 12(2) rescission of a sale, had complied with Section 13's limitations requirements. In so holding, Judge Tenney stated that the dispute is

> as to what information was actually in plaintiffs' possession, or could have been obtained by the exercise of reasonable diligence, and when.

In this case, as discussed *infra,* there is no dispute concerning whether plaintiff possessed any of the D & M, Schafer or Mercantile reports or any of the relevant Trice schedules. Further, the facts are clear that plaintiff did not possess such reports or such knowledge as would have required it to obtain such reports after March 1, 1962, and before November 1, 1962.

Whether reasonable diligence has been exercised in any given case does not, once the facts are established, involve a finding of fact, but rather the application of a standard and therefore a question of law. See *Dale* v. *Rosenfeld, supra,* at 858. There is no material issue of fact to be resolved in the case at bar as to what information Hopkins had in its possession, and as to whether on the basis of that information Hopkins' could, in the exercise of reasonable diligence, have known that LaPiere did not disclose

to it the true information with regard to the bases for the reserve estimates made to Hopkins. Hence, in this case, only the standard—the rule of law—remains to be applied to established facts. On the state of this record, this Court has no difficulty in ruling as a matter of law that Hopkins' Section 12(2) action herein is not barred by limitations. Even if, before November 1, 1962, Hopkins could have discovered, by the exercise of reasonable diligence, that some of the oil reserves were less than estimated, this discovery would not have led Hopkins to believe that LaPiere had made false material statements and had withheld material information with regard to the bases of those estimates.

Rescission

Whether Hopkins is entitled to rescission in this case involves no genuine question of disputed fact. The facts are clear both as to the current status of the production payment and as to the changes which have taken place in it since March 1, 1961.

Hutton, as broker for Trice, is subject to the remedy of rescission. Rescission under Section 12((2) "can be applied without difficulty to an agent of a vendor; the agent, by misrepresentations having effected a sale, is required to take over the securities from the defrauded buyer and to restore to the latter the price he paid." *Cady* v. *Murphy, supra,* 113 F.2d at 991. See also III Loss, *Securities Regulation, supra,* 1714. Hopkins has made a timely tender within the provisions of Section 12(2) by the allegations in its amended complaint.[33] Cf. *Moses* v. *Michael, supra*

[33] The record does not disclose whether Hopkins did in fact tender prior to the institution of this suit. Hopkins alleges tender in a paragraph in its original and amended complaint, in which

at 619; *Stadia Oil & Uanium Co.* v. *Wheelis,* 251 F.2d 269, 273, 274 (10th Cir. 1957); II Loss, *Securities Regulation, supra,* 1674-75 and 1720. Furthermore, unlike the plaintiff in *Huglin* v. *H. M. Byllesby & Co.,* 72 F.2d 341 (8th Cir. 1934), which dealt with the Iowa Securities Law, and in which plaintiff had sold to defendant certain shares which plaintiff had, prior to such sale-back, purchased from defendant, Hopkins has not at any time disposed of the production payment and thus has not placed itself in a position in which it could not make tender.

Between March 1, 1961, and the Trice bankruptcy in October, 1962, and between the latter date and the date this suit was instituted and in fact, to the beginning of the year 1968, if not to date, Hopkins has only taken such steps to protect its investment in the production payment as it believed advisable. There are no questions of fact to be resolved in this regard. Only the legal question remains as to whether, against the background of these facts, Hopkins has done, omitted to do, or permitted something to be done or not to be done, which has so altered the character of the production payment as to require this Court to hold the remedy of rescission unavailable to Hopkins because it cannot now turn over to Hutton a security essentially equivalent to that which Hopkins acquired on March 1, 1961.

The question of what constitutes good tender under the blue sky law rescission provisions has been answered in a number of ways by the Courts. *See* III Loss, *Securities Regulation, supra,* 1672, *et seq.* In one such case, the

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allegations of violations of statutory duty by Hutton are also made. Hutton generally denies the allegations of that paragraph. Such denial does not raise any material issue of fact in view of the legal adequacy of the tender set forth in the complaint itself.

Massachusetts Supreme Judicial Court has found a tender adequate despite the occurrence of substantial changes in the security. *Commissioner of Banks* v. *Chase Securities Corp.*, 298 Mass. 285, 329, 10 N.E.2d 472, 498 (1937), appeal dismissed, 302 U.S. 660 (1938).[34] It is possible that in this case this Court is asked to go even further in finding an adequate tender. And yet nothing which has taken place since March 1, 1961, has caused any substantial change in the production payment which Hopkins purchased. Hopkins' failure, in April, 1961, to press a claim under the Trice guarantee for an amount as small as $1,500 with regard to the Dollar well did not result in any material alteration of the security, the terms of which referred to the possibility of abandonment. The decision of Hopkins to sign the supplemental agreement could reasonably have been determined by Hopkins to be necessary for the very existence and maintenance of its original investment, or of a security as nearly as possible equivalent thereto. Also, the unitizations,[35] and abandonments and plugging of wells covered by Hopkins' $1,300,000 production payment were contemplated by the terms of

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[34] As Hutton has pointed out on page 111 of its *Answering Brief in Opposition to Hopkins' Motion for Summary Judgment*, there is a paucity of cases involving the issue of tender under Section 12 of the '33 Act. None of the cases which do involve the issue of tender under Section 12 consider the question of the effect of certain changes in the security, sought to be tendered, which took place as part of the normal course of events contemplated by the security and because of the purchaser's efforts to preserve its investment. *See* Repass v. Rees, 174 F.Supp. 898, 906 (D.Colo. 1959); Campbell v. Degenther, 97 F.Supp. 975, 978 (W.D.Pa. 1951).

[35] Unitization is referred to and/or contemplated in the undertaking in the NOW, THEREFORE, paragraphs preceding Article I, Section 1; Article II, Section 1; Article III, Section 7; and Article IV, Section 11.

the production payment agreement executed March 1, 1961.[36]

In finding that Hopkins has made an adequate tender, this Court looks to substance rather than form in order to enforce the broad remedial policies of Section 12(2). Compare III Loss, *Securities Regulation, supra,* at 1675-76. Hutton, saddled as it is with LaPiere's untruths and omissions, should not be able to shield itself from rescission by complaining that Hopkins used bad judgment in trying to protect its investment. To contend, for example, that Hopkins should have actively contested issues with regard to unitization of oil wells at certain administrative hearings, is merely to second-guess Hopkins and its advisors in their attempts to save their investment. In this connection, it is undisputed that Hopkins had the benefit of legal and engineering advice in the period between the Trice bankruptcy and the institution of this suit.

In *Jannigan* v. *Taylor,* 344 F.2d 781 (1st Cir. 1965), *cert. denied* 382 U.S. 879 (1965) Judge Aldrich, for the First Circuit, wrote that when the defrauded person is the seller, the Court in shaping a remedy should, as a general rule, give him, rather than the fraudulent party, the "windfall." 344 F.2d at 786. Noting that there were limits to this dictum, Judge Aldrich wrote:

> . . . If any artist acquired paints by fraud and used them in producing a valuable portrait we should not suggest that the defrauded party would be entitled to the portrait, or to the proceeds of its sale. However, those limits are not reached in the case at bar. . . . [344 F.2d at 787].

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[36] Abandonments and plugging are contemplated by Article III, Section 3 and perhaps by Article III, Section 6.

Similarly, such limits are not reached in this case. How far a security can be changed in order for a tender under Section 12(2) to be impossible and rescission under Section 12(2) to be unavailable is a matter this Court need not resolve. It need only conclude that the "limits" of an adequate and timely tender were not reached by the changes in the Trice production payment purchased by Hopkins after March 1, 1961.

It should also be noted that the language of Section 12 of the '33 Act would seem to allow a tender of a security in which changes have occurred. Under this Section a damage remedy is allowed to an aggrieved purchaser *only* "if he no longer owns the security." "It is clear that if the defrauded buyer still owns the security, his only remedy under this section [12] is rescission. He cannot sue for damages unless he has disposed of the stock. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288. . . . (1940)." *Pfeffer* v. *Cressaty*, 223 F.Supp. 756, 757 (S.D. N.Y. 1963). In view of the broad remedial policies underlaying Section 12, and the unavailability to him of Section 12(2) damage relief, a purchaser who still owns the security, and who has not unnecessarily changed it, should be allowed to tender that security and receive the benefit of the Section 12 rescission remedy. Once it is determined that Hopkins is entitled to relief under 12(2), the only remaining question is whether the remedy available is rescission or damages. Unless it be held that the changes in the March 1, 1961 production payment after that date constitute a disposal of the security by Hopkins—a conclusion which is not, in this Court's opinion, in any way supported by the undisputed facts—Hopkins' only remedy under 12(2) is by way of rescission. In this Court's view,

both the provisions of Section 12(2) and the equities of this case call for the application of the remedy of rescission.

CONCLUSION

Based on undisputed facts, Hopkins is entitled to an Order requiring rescission under Section 12(2) with respect to the first count of the complaint. That Order should provide for dismissal of all of the other counts of the complaint, contingent upon Hutton's compliance with the aforesaid Order of rescission. Hopkins is asked to prepare and submit such an Order.

FRANK A. KAUFMAN
United States District Judge

Memorandum*

(Filed December 10, 1968)

The following corrections and changes have today been made in the opinion filed herein on August 15, 1968.

A. *Corrections on original pages*

1. p. 7, line 20; p. 8, lines 11, 20, 22, 24; p. 9, line 25; p. 11, lines 8, 29.
   Change "LaPierre" to "LaPiere"

2. p. 10, line 20; p. 46, lines 3, 5.
   Delete apostrophe from "Hopkins'"

3. p. 13, fn. 2, line 14.
   Insert ", as it relates" after "Defense"

4. p. 13 fn. 2, line 16.
   Delete "the"

5. p. 16, fn. 5, line 4.
   Change "Mackoy Younger" to "Mackoy (Younger)"

6. p. 21, line 15.
   Change "Cordon" to "Gordon"

7. p. 37, Finding of Fact 66, line 4.
   Change "Covington" to "Carrington"

8. p. 41, line 20.
   Change "Bakers" to "Bankers"

9. p. 45, line 22.
   Change "$25,000" to "$24,000"

10. p. 49, line 9.
    Change "Chapter 10" to "Chapter X"

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* This is memorandum of Kaufman, J. correcting his opinion filed August 15, 1968.

11. p. 51, line 22.
Delete comma after "payment"

12. p. 59, line 9.
Delete "literally"

13. p. 66, line 6.
Delete comma after "Circuit"

14. p. 69, line 7.
Change "131" to "133"

15. p. 75, line 9.
Delete comma after "made"

16. p. 75, line 12.
Delete "did not know, and" and put in its place "knew, or"

17. p. 75, line 13.
Delete "not"

18. p. 82, line 4.
Change "corporation and *Hawkins*" to "corporation; and *Hawkins*"

19. p. 89, second line from bottom.
Delete one "at"

20. p. 90, line 12.
Insert ", in the case of Hopkins," between "and" and "additional"

21. p. 90, line 13.
Insert "as well" after "profits"

22. p. 92, line 2.
Change "September 14, 1960" to "September 16, 1960"

23. p. 94, fifth line from bottom.
Change "February 24, 1961" to "February 3, 1961"

24. p. 96, line 9.
Change "summary" to "Summary"

25. p. 97, line 5.
Insert an interior quotation mark after "question" and before the outside quotation mark

26. p. 102, line 18; p. 111, line 11.
Delete the comma after "III"

27. p. 105, line 14.
Delete "not"

28. p. 112, line 20.
Change "Securities Corp." to "*Securities Corp.*"

29. p. 113, line 17.
Change "Securities Regulation" to "*Securities Regulation*"

30. p. 114, line 4.
Add "*cert. denied* 382 U.S. 879 (1965)" at end of line

B. *Substituted pages*

1. p. 15: Delete footnote and replace with:

"[4] The voluminous record in this case does not permit this Court to make individual findings of each and every undisputed material fact. However, this Court has endeavored, and believes that it has succeeded, in not omitting to find any material undisputed fact which could, in any way, require

any conclusion as to any legal issue in connection with the Section 12(2) count of this case, different from the conclusion which is set forth in this opinion."

2. p. 17:

(a) Delete third sentence of footnote 7 and replace with:

"The $303,957 figure is reached by adding back the portion of the capital expenditure deducted originally in the D & M report about which Ford of Trice later wrote Ketcham, suggesting that that deduction should be eliminated because certain wells, including the Windle well, had been completed since the date of the D & M report and the capital expenditure made."

(b) Delete second sentence of footnote 8 and replace with:

"This figure is submitted along with the Windle recomputation and is also based on adding back a previously deducted capital expenditure and on a different fractional interest, this time smaller, utilized by Brown and Bednar."

(c) Delete footnote 9 and replace with:

"Counsel for defendants present a $128,445 figure for Denns, which like Windle and Weatherford reflects a restoration of a capital expenditure based on the August 27, 1960, Ford-to-Ketcham letter."

3. p. 20: Delete second sentence of Finding of Fact 14 and replace with:

". . . Ford explained that the D & M estimates, which were made before the Trice figures were assembled, were lower than the Trice figures because the D & M figures reflected a deduction of certain estimated capital expenditures; that the latter were not deducted for the Trice figures because subsequent to the date of the D & M report these four wells had been completed and those expenditures made."

4. p. 24: Add the following sentence to footnote 12:

". . . When 'interest' is used in this opinion in connection with any discussion or reference to the production payment purchased by Hopkins on March 1, 1961, it is a short-hand way of saying 'an amount equivalent to interest.'"

5. p. 28, Finding of Fact 46.

(a) Change "$2,700,000; stated" to "$2,700,000; and stated" on line 5

(b) Delete the last clause of Finding of Fact 46 (i.e. clause beginning "and stated that the normal yardstick . . . .") Change semi-colon after "properties" on line 8 to period.

The originals of the said removed pages are attached hereto along with xeroxed copies of the corrected pages before the latter were corrected.

FRANK A. KAUFMAN
United States District Judge

Dated: December 10, 1968.

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Supplementary Opinion

Dated December 10, 1968*

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

THE JOHN HOPKINS UNIVERSITY *v.* JAMES M. HUTTON, JR., ET AL.	Civil No. 15098

EDMUND P. DANDRIDGE, JR., JOHN HENRY LEWIN and VENABLE, BAETJER AND HOWARD, Baltimore, Maryland, for Plaintiff.

JOHN F. KING, Baltimore, Maryland, JOHN A. WILSON, MICHAEL J. DESANTIS and SHEARMAN & STERLING, New York, New York, for Defendants.

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* Incorporated in officially reported opinion, 297 F. Supp. 1165 (D. Md. 1968)

Supplementary Opinion Dated December 10, 1968

Kaufman, District Judge.

This Court has this day entered a decree in this case pursuant to the conclusions set forth in its opinion filed August 15, 1968. A number of issues have been presented in the course of the formulation of that decree. Their resolution is discussed in this Supplementary Opinion.

Court's Power to Make Changes in its Opinion as Originally Filed

After this Court filed its opinion on August 15, 1968, counsel for Hopkins suggested thirty-eight corrections and additions. Except with regard to the correction of typographical, mathematical or inadvertent errors, and except in connection with several clarifying changes, which this Court has today made, the suggestions advanced by Hopkins are herewith declined. For the most part Hopkins asks this Court to make findings of undisputed fact which cannot appropriately be made within the confines of summary judgment. Other changes requested by Hopkins would require this Court to make findings of fact, which, while undisputed, would in no way alter or control the resolution of the legal issues raised by the Section 12(2) count in this case. Obviously, even in an opinion as lengthy as the one filed by this Court on August 15, 1968, every undisputed fact can hardly be culled from a record of thousands of pages and set forth in the opinion itself.

Hutton, in reply, not only opposes almost all of Hopkins' suggested changes, but maintains that except for correction of typographical errors and the like, this Court should make no changes in its opinion as filed.

> This [writes Hutton's counsel in a Memorandum presented to this Court] is a long and complicated case and the question presently at issue is whether there exist for trial genuine issues of material fact. On appeal, the weight and emphasis the Court gave the many facts involved, its selection of certain facts as material and undisputed and its exclusion of others as being of no or little consequence, are of crucial importance, It is the Court's Opinion as written by the Court which discloses the process by which the the Court resolved the manifold questions raised by the case. The comprehension and accuracy with which the Court considered and wrote its Opinion are therefore essential matters for proper evaluation on review. The Opinion as it stands is the best evidence of the Court's understanding, interpretation, and application of the facts—and the facts are the crux of decision on summary judgment. [Hutton's Memorandum dated September 26, 1968, pp. 2-3].

This Court, as stated above, is making certain changes in its opinion as originally filed. A memorandum referring to each such change is being placed in the Court file. This Court believes that it clearly possesses the power to recall all of its opinion as originally filed and to change it as it sees fit in its discretion. The record in this case speaks for itself. It, and it alone, compels legal results and determinations.

Supplementary Opinion Dated December 10, 1968

Deaths of Four of the Original Defendants

Austin E. Casey, an original defendant in this case, died January 1, 1964. A suggestion of his death was filed in these proceedings on November 23, 1965; pursuant to Rule 25 of the Federal Rules of Civil Procedure. A. Hunt Marckwald, another original defendant herein, died July 1, 1966. A suggestion of his death was filed in this case on July 19, 1966. No motion for substitution was made by any of the parties to this case, or by the successors or representatives of either such deceased defendant, within the ninety day period after the filing of the suggestion of death as provided in Rule 25. Therefore, in accordance with the provisions of that rule, the complaint in this case is dismissed as to each of said two deceased defendants.

James M. Hutton, Jr. and Vernon H. Hall 2d were also originally named defendants in the instant action. The former died on December 26, 1967; the latter on July 4, 1967. Suggestions of death were filed pursuant to Rule 25 on September 4, 1968, with respect to James M. Hutton, Jr. and on September 16, 1968, with respect to Vernon M. Hall 2d. Motions for the substitution of the respective executors of the estates of the said two deceased defendants were subsequently filed herein, followed by service thereof upon both of those executors. No answer and no notice of opposition with respect to either such motion has been filed in, or made known to, this Court. Therefore, the substitution as defendants herein, of John C. Baity, Executor of the Estate of James M. Hutton, Jr., Deceased, and of Ralph C. Copeland, Executor of the Estate of Vernon H. Hall 2d, Deceased, is hereby ordered.

Supplementary Opinion Dated December 10, 1968

Rate of Interest

Section 12 of the Securities Act of 1933 provides that a purchaser of a security who is entitled to relief under that section shall "recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security." This statute thus establishes a right to pre-judgment interest but does not set a specific rate.[1]

Congress, in enacting Section 12, acted against the background of both extensive state legislation and familiar equitable remedies. Hopkins urges that the maximum legal rate of the forum state must be applied and cites as authority *Circle Line Sightseeing Yachts, Inc.* v. *Storbeck,* 325 F.2d 338 (2d Cir. 1963) and *Messina* v. *Mutual Benefit Health and Accident Association,* 228 F.Supp. 865 (D.D.C. 1964). However, those cases involve the construction of state and local statutes, rather than the appropriateness of incorporating state standards into a federal remedial statute with nationwide scope. The latter is the issue to be resolved in this case. For the equitable goals sought to be achieved by Section 12 could be frustrated in states with very high or low legal rates of interest if those state standards were deemed automatically controlling. "Federal law is no juridical chameleon, changing complexion to match

[1] In certain other federal statutes the Congress has fixed the rate of pre-judgment interest. *See, e.g.,* 46 U.S.C. §743 (4%, or higher if specified by contract, on money judgments in certain cases of libel in personam); 28 U.S.C. §2411 (6%, or 4% in certain cases, in connection with internal revenue taxes); 28 U.S.C. §2516 (4% on judgments against the United States in the Court of Claims which are affirmed by the Supreme Court). Also compare 28 U.S.C. §2674 which bars pre-judgment interest in cases brought under the Federal Tort Claims Act.

that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes." *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).[2] Nor does there appear to be any

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[2] Mr. Justice Jackson, concurring:

. . . The Federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the Federal government. But this is not to say that wherever we have occasion to decide a Federal question which cannot be answered from Federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the Federal non-statutory or common law.

I do not understand Justice Brandeis's statement in Erie R. Co. v. Tompkins, 304 US 64 at 78, 82 L ed 1188, 1194, 58 S Ct 817, 114 ALR 1487, that "There is no Federal general common law," to deny that the common law may in proper cases be an aid to or the basis of decision of Federal questions. In its context it means to me only that Federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the Constitution, treaties, or statutes of the United States [so] require or provide.". . .

Were we bereft of the common law, our Federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.

. . .

. . .

A Federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the Federal Constitution, statutes, or common law.

convincing local policy which would compel this result. *Cf. Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946).[3] Since Congress has not seen fit either to prescribe a specific rate of interest or to express a preference for the use of the maximum legal rates in effect in the various states, this Court believes that the remedial ends of Section 12 can best be served by a judicial determination of the rate of interest required by the equitable considerations present in each individual case. *Cf. Royal Indemnity Co.* v. *U. S.*, 313 U.S. 289 (1941); Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 706-708 (1953).

Interest is imposed under the Securities Act of 1933 to compensate fairly the defrauded purchaser for the loss of the use of his money. *See Collier* v. *Granger*, 258 F.Supp. 717 (S.D. N.Y. 1966). The comparative states of the money market at the times of purchase and of rescission are important factors in determining a compensatory rate of interest. *See Clarke Baridon, Inc.* v. *Merritt-Chapman & Scott Corp.*, 311 F.2d 389 (4th Cir. 1962); *Montgomery-Ward & Co.* v. *Collins Estate, Inc.*, 268 F.2d 830 (4th Cir. 1959); *Chesapeake & Ohio Ry.* v. *Elk Refining Co.*, 186 F.2d

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Federal common law implements the Federal Constitution and statutes, and is conditioned by them. Within these limits, Federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present. Board of Commissioners v. United States, 308 US 343, 350, 84 L ed 313, 316, 60 S Ct 285. [footnotes omitted; 315 U.S. at 469-72].

[3] Congress has the power to create and define the rights and remedies of parties dealing in securities in interstate commerce. The federal courts, therefore, are not invading the legislative province of the states when they apply the "federal common law" to fill in specific details which Congress has omitted. *See* Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 697-99 (1953).

30 (4th Cir. 1950). Hopkins is in a different position than are plaintiffs injured by breach of contract or tortious conduct by another. Such plaintiffs may have had to borrow cash to meet expenses incurred as a result of such breach of contract or tortious conduct, because they required the use of that cash before a favorable verdict could be obtained. *See Moore-McCormick Lines, Inc.* v. *Richardson,* 295 F.2d 583, 594 (2d Cir. 1961). In such cases the status quo can perhaps be re-established by the court's utilizing the interest rate charged to the injured party. In this case Hopkins was simply an investor anticipating a return on its investment. In order to place Hopkins in the position it would have been in were it not for the violations by LaPiere of the standards of Section 12, an examination is required to determine what Hopkins could reasonably have been expected to earn by a similar type of investment. This is the approach used by Judge Winter (sitting by designation as a District Judge) in *Baumel* v. *Rosen,* 283 F.Supp. 128, 148 (D.Md. 1968). *Cf. Moore-McCormack Lines, Inc.* v. *Richardson, supra,* at 59; *Hartford National Bank & Trust Co.* v. *Drew,* 188 F.Supp. 347 (D.Del. 1960), *affirmed* 290 F.2d 589 (3d Cir. 1961).

The $1,300,000 production payment transaction included an undertaking to pay to Hopkins "the equivalent of interest" at the rate of six percent per annum (Article I, §§1, 4), plus, in addition, net profit overriding royalty interests in the property after the termination of the production payment (Article II). The Trice brochures predicted additional earnings which, when calculated, exceed the six percent figure (*see* Findings of Fact 32, 33 and 54). And LaPiere represented to Hopkins that those earnings estimates were conservation on the basis of the information he possessed (*see* Findings of Fact 56 and 63). A similar

Trice production payment sold the year before, calling for payment of the "equivalent of interest" at the rate of six percent per annum, was subscribed to by Bankers Trust through Hutton's brokerage efforts (*see* Findings of Fact 22-26). Those undisputed facts establish, at the very least, that Hutton, an experienced brokerage firm, considered six percent per annum a reasonable rate of return in 1960 and in 1961, as did Bankers Trust, an experienced investor.

Hutton has submitted to this Court certain data concerning prime interest rates during the period March, 1961-October, 1968, and has asked this Court to take judicial notice of the same. So doing, this Court notes that on March 1, 1961, the prime rate was 4½% per annum, or 1½% below 6%. At no time during the said period was the prime rate below the 4½% rate in effect on March 1, 1961. Indeed, Hutton's data shows that for almost half of that period the prime rate was at least a full percentage point above the March 1, 1961 rate of 4½%. Thus, Hutton's statistcs demonstrate that if the reasonable level of return for the type of investment purchased by Hopkins was six percent in the late part of 1960 and in the early part of 1961, that reasonable level cannot be said to have dipped below six per cent during the years which have intervened because of comparisons or relationships with or to prime interest rates.

This Court concludes that Hopkins could reasonably have expected to earn six percent per annum on its investment between March 1, 1961 and December 10, 1968. Therefore, this Court hereby requires defendants to pay simple interest on the outstanding consideration paid by Hopkins to Trice, at the rate of six per cent per annum. Actually, it could well be argued that the rate should be higher in order to compensate Hopkins adequately. Both the net profits

overriding royalty interests provisions (Article II and the representations of Trice and LaPiere (*see* Finding of Fact 56) suggest a range in excess of six percent. However, this Court's decree calls for rescission, not specific performance. The rate of six percent is selected because this Court believes Hopkins could reasonably have expected a six percent return on the type of investment involved. Even though Hopkins might have earned more than six percent on the production payment it purchased from Trice if LaPiere's conduct had not violated Section 12 standards, Hopkins, in a rescission context, is only entitled to interest at the six percent rate.

It is contended by Hutton, and even apparently conceded by Hopkins, that the Maryland maximum legal rate of six percent per annum poses a rate ceiling beyond which this Court should not venture. As discussed *supra*, such a state maximum may or may not be binding upon a federal court acting in the context of enforcement of federal statutory requirements and policies. However, the question of a rate over and above the Maryland legal rate does not need to be answered herein in view of this Court's conclusion that six percent is the appropriate equitable rescission rate under the uncontroverted factual circumstances of this case.

Consideration and Income as Those Words Are Used in Section 12

Hutton urges that in order to achieve a fair result this Court should direct Hopkins to pay interest to Hutton on the income which Hopkins received from the production payment from the dates each payment of income was so received. Hutton argues that despite the silence of Section 12 in this regard, as opposed to its affirmative provision awarding interest to Hopkins on the consideration, this

Court has the discretionary power and duty to award such interest to Hutton so that equity will be done.

There does not appear to be any relevant legislative history on this particular question. *See* III Loss, *Securities Regulation,* 1720-21. A strict construction of the remedial language of Section 12 could lead to the conclusion that Congress intended that the benefit of interest be given only to the defrauded purchaser. It may also be argued that any ambiguities present in the statute should be resolved in favor of the defrauded party so that he, rather than the wrongdoer, should obtain any resulting "windfalls." *Cf. Jannigan* v. *Taylor,* 344 F.2d 781, 786 (1st Cir. 1965); *cert. denied* 382 U.S. 879 (1965). On the other hand, since this statute should be read against the background of the common law of rescission which has evolved in the federal courts, it is possible that this Court has the power to construe the statute so as to provide for such relief as equitable considerations dictate. See *Royal Indemnity Co.* v. *U. S., supra; Collier* v. *Granger, supra.* This Court need not decide whether it has such power in this case, however, because it concludes that a just result is achieved by strictly reading the terms of the statute as applied to the type of investment involved herein. In so doing, this Court is guided by the purpose underlying the rescission remedy—to place the buyer and seller (or Hutton, for Section 12 purposes) in the same positions they would have been in but for LaPiere's violations of Section 12 standards. In other words, the status quo ante should be ascertained and then restored as nearly as possible.

The production payment purchased by Hopkins from Hutton is not prevented from being a security by the comparative complexity of its provisions. But Section 12's rescission remedy is more easily analyzed in the context of

the sale and purchase of a given number of shares of stock, pursuant to which the seller retains the consideration over the period of investment and the buyer receives during that period interest or dividends.[4] It is clear that during the investment period, the buyer has the use of the income which it receives and the seller has the use of the consideration paid by the purchaser. If the transaction has been tainted by material misrepresentations and omissions on the part of the seller, and the remedy of rescission becomes applicable, the buyer will receive the consideration he has paid, with interest at the rate which the buyer could reasonably have expected to earn by an investment of the same type. If the buyer has in fact received some income from the rescinded deal, the status quo ante will be reached by crediting the seller with the amount of income that the buyer did in fact receive. It should be noted that to award interest to the seller on this latter amount would put the buyer in a worse, and the seller in a better, position than the status quo ante. A fair result thus comports exactly with the terms of the Section 12 rescission remedy—that the defrauded purchaser should recover "the consideration paid for such security with interest thereon, less the amount of any income received thereon."

Further, to award interest to a seller on the "income" received by the buyer would require, in order to reach a just result, the parallel award of interest to the buyer on the interest already imposed as compensation for the income which the buyer reasonably could have expected to earn. There is, of course, no general principle that precludes an award of interest on such income. *See Railroad*

[4] For the sake of simplicity, it is assumed in this example that the market value of the stock remains constant throughout the investment period.

Credit Corp. v. *Hawkins,* 80 F.2d 818 (4th Cir. 1936). However, given the specific terms of Section 12, this result could be achieved only if this Court determined that it had the equitable power to, in effect, rewrite the remedial language of the statute. Judicial revision of the specific terms of a statute is of a different order than filling in gaps on points where Congress has remained silent. It should be considered only when necessitated by compelling reasons of policy reviewed in the light of the legislative purpose. *Cf. Burnett* v. *New York Central R. R.,* 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959). This Court believes that an equitable result is achieved in this case by applying the terms of the statute to the type of investment involved herein and does not consider it appropriate to award interest to Hutton on the "income" received by Hopkins and to Hopkins on the income which Hopkins could reasonably have expected to earn. There are, therefore, no persuasive policy considerations at hand which require an examination of this Court's power to rewrite the language of Section 12.

The transaction involved in this case differs from the hypothetical example set out above in that the $1,300,000 consideration paid by Hopkins was to be repaid in increments during the investment period. Proceeds from the production of the wells were to be applied first to the "equivalent of interest" payments, second to certain taxes that might be due, and third to the repayment of the primary sum (*see* Article I, §2). And, as the amount of the primary sum retained by Trice was reduced, the sum payable to Hopkins as "the equivalent of interest" was to be scaled to six percent of the monthly unpaid balance (*see* Article I, §4). Thus, only payments received by Hopkins as "the equivalent of interest" can be correctly classified

as "income" as that word is used in Section 12. The partial repayments of the primary sum were reductions of "consideration" as that word is used in the statute. And the amounts to be applied to taxes were payments for that purpose, and are therefore not to be classified as either "income" or "consideration."

Hopkins incurred a number of expenses, legal, accounting and engineering, in connection with this suit and in handling its March 1, 1961 investment with Trice. However, those expenses do not figure in the determinations of consideration, interest and income as those words are used in Section 12. But, in addition, Hopkins returned to the Trustee for Trice, pursuant to the supplemental agreement (referred to in Finding 118) the sum of $3,142.36 to enable Trice to have sufficient funds to operate the properties underlying Hopkins' production payment. At at later date, Hopkins, for the same reason, paid to Trice Production Company (reorganized) the sum of $20,302.73. That these payments were in fact made by Hopkins to the Trustee and to the reorganized company is not disputed by Hutton. Nor does Hutton dispute the fact that Hopkins and Trice applied those two return payments by Hopkins as credits against income and thus as reductions of the total income received by Hopkins. This Court will also so apply them. While the terms of the production payment agreement itself (Article I, §§5, 8) do not literally so require, they clearly so suggest.[5] Further, equitable considerations would

[5] Article I, Section 5 provides:

> If any of the proceeds of the sale of oil, gas and other minerals attributable to the production payment hereby granted shall be withheld for any reason whatsoever, then such proceeds shall not be deemed to have accrued to Johns Hopkins until such proceeds have actually been received by Johns Hopkins; or, if at any time either before or after the receipt of the full net

seem to entitle Hopkins not to be charged with having received a total figure, labelled income, which includes sums which were returned by Hopkins to Trice or its successors. Hutton argues that Hopkins should, at the very least, be required affirmatively to prove that the sums so paid were reasonable. But Hutton is in Trice's shoes and cannot complain that Hopkins paid back to Trice, out of income received from Trice by Hopkins, sums which, *arguendo*, Trice did not need, in whole or in part, to continue Trice's operation of the properties underlying Hopkins' production payment. Thus, income under Section 12, as calculated in this case, should exclude the two sums of $3,142.36 and $20,302.73.

In this case the amount of the consideration paid by Hopkins to Trice did not remain constant during the period between the date of purchase, i.e. March 1, 1961 and the date of the decree of rescission i.e. December 10, 1968. Thus,

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aggregate amount above provided for in Section 1 hereof, Johns Hopkins shall be compelled to pay over the proceeds from the sale of any such oil, gas and other minerals theretofore received or to make any payment on account of oil, gas and other minerals taken by Johns Hopkins in kind, the amount of such proceeds or such payment (plus all amounts which Johns Hopkins shall be compelled to pay in the nature of interest, damages and penalty) shall not be deemed to have accrued or be attributable to Johns Hopkins and shall be restored to the primary sum and liquidated and paid in the same manner.

Article I, Section 8 provides:

None of the development or operating costs or other similar expenses incurred in operating and developing the Contract Properties or in treating or storing the oil, gas and other minerals produced therefrom, nor any part of any royalty or other burden (except the Oilco Production Payment which is an additional burden) shall be borne by Johns Hopkins, and Trice shall hold and save Johns Hopkins harmless from all such costs, expenses and liabilities.

it is necessary to determine the amount of consideration outstanding from time to time during that period and to calculate interest on the consideration outstanding during the fractional parts of that period which add up to the total period.

In this case, the "consideration" which Hopkins is entitled to receive at this time is the original $1,300,000 less the repayments of principal received by Hopkins. To that figure, there should be added interest at the rate of six percent per annum on the consideration outstanding and unreturned from time to time. From the resulting figure, there should be deducted the total of the payments received by Hopkins as the equivalent of interest. Thus, Hopkins will recover the consideration originally paid by it and not repaid to it, with interest on the consideration outstanding from time to time, less the income received by it.

Date From Which Interest Runs

Having determined that Hopkins is entitled to prejudgment interest at a rate of six percent per annum on the consideration outstanding from time to time, this Court must now fix the date from which the award of interest begins to run. Section 12 is silent on this point.

Under the common law relating to fraud and deceit, that date was the date on which the fraudulent sale was made, "notwithstanding the fact that damages were not fixed, or frozen, until the stock was subsequently sold." *Collier* v. *Granger*, 258 F.Supp., *supra*, at 719. Since the purpose of awarding interest to the defrauded purchaser is to compensate him for the amount which he could have safely earned by the use of his money, the choice of any later date would amount to a decree of less than full compensation.

Cf. Chesapeake & Ohio Ry. v. *Elk Refining Co.*, 186 F.2d 30, 33 (4th Cir. 1950).

Hutton argues that interest runs only from the time that Hopkins' claim became liquidated or ascertainable. That date, Hutton asserts, was when Hopkins submitted to this Court and to Hutton, after August 15, 1968, a definitive statement of the income Hopkins received from the production payment. *Compare U. S.* v. *Moore-McCormick Lines, Inc.*, 199 F.Supp. 522, 530 (D.Md. 1961), *reversed on other grounds* 308 F.2d 866 (4th Cir. 1962). But Hutton is obligated by Section 12 to pay interest on the consideration paid for the security. And that amount was fixed by developments on and after the date of the sale. While Hopkins' claim may not perhaps be deemed "liquidated," as that term has sometimes been used in tort and contract law, this Court does not believe that Congress intended "the hoary distinction between 'liquidated' and 'unliquidated' claims, criticized by eminent authority well before . . . 1920,"[6] to be mechanically applied when such application would thwart the compensatory purposes of the remedial legislation set forth in Section 12.[7]

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[6] Chief Judge Lumbard in Moore-McCormick Lines, Inc. v. Richardson, 295 F.2d *supra*, at 592.

[7] Even if the resolution of this issue turned on whether Hopkins' claim is "fixed" or "variable," or "liquidated" or "unliquidated," the result urged by Hutton would still not automatically follow. Where the plaintiff's claim was in fact part fixed and part variable, it has not been unknown for the courts to impose interest on the fixed part of the claim from the date it became due and to defer the date for interest to commence on the remainder of the claim until such time as that remainder portion should become fixed and known. *See, e.g.*, Ward v. Hellis, 103 F.2d 519 *modifying* 102 F.2d 519 (5th Cir. 1939). And, in Chesapeake & Ohio Ry. v. Elk Refining Co., *supra*, a case involving a tort claim arising out of a railway crossing accident, the Court said:

Supplementary Opinion Dated December 10, 1968

Attorney's Fees

Section 11(e) of the '33 Act gives the Court discretionary authority, in a suit brought under Section 12, to require the defendant to pay "reasonable attorney fees" if it "believes . . . the defense to have been without merit." 15 U.S.C. §77(e). A Section 12 defense "without merit" is one bordering on frivolity or interposed in bad faith. *Can-Am Petroleum Co.* v. *Beck*, 331 F.2d 371 (10th Cir. 1964); *Stadia Oil & Uranium Co.* v. *Wheelis*, 251 F.2d 269 (10th Cir. 1957). *See Katz* v. *Delka Research Corp. of New Jersey*, 63 Civ. 288, CCH Federal Securities Law Reporter ¶92,178 (S.D.N.Y. March 29, 1968). Although Hutton has been unsuccessful in avoiding liability under Section 12, the record

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. . . [W]e think that the judge was in error in not including in the award interest to the time of trial. The damage was done in May 1948, and the award was not made until May 1950, two years later. While not liquidated in the strict sense of the term, the damage was readily ascertainable at the time; and, if plaintiffs are allowed in the judgment only the amount of the damage that was sustained two years before the award, it is manifest that they have not been awarded full compensation. An award two years after an injury occurs is certainly not the equivalent of an award made at the time of the injury; and the great weight of authority is to the effect that full compensation for damage to or destruction of property requires that, even in the case of unliquidated demands, account be taken of the period that has elapsed between the damage and the award and that allowance be made for interest. In some states this allowance is made as a matter of legal right, in others it is within the discretion of the assessor of the damages [citations omitted; 186 F.2d at 33].

Further, in this case, the original consideration paid by Hopkins, i.e. $1,300,000 clearly became a known, liquidated amount on March 1, 1961. The reductions, i.e. the repayments of principal became certain and liquidated and known to Hopkins and Trice as they were paid by Trice to Hopkins. Hutton, chargeable with what Trice knew, can hardly contend that Hutton did not know the amounts of those fixed, certain payments as they were made.

does not reveal that the totality of Hutton's defense in this long and complex case bordered on frivolity or was made in bad faith.

In urging that this Court impose the cost of attorney fees on Hutton, Hopkins stresses the long delay between institution of this suit and the date of the decree. But a large part of that delay was unavoidable: both sides engaged in very extensive discovery and, as this Court notes in its main opinion, "put this case through the wringer." Hopkins focused its investigations principally upon the past activities of one person—Gilbert LaPiere—who had previously left Hutton's employ. Hutton examined closely into the actions of those agents of Hopkins and Trice who negotiated with LaPiere and had other contact with the production payment transaction. Those investigations were not mere academic exercises. They were of importance in the context of Section 12(2) in determining what Hopkins knew. Their very scope and precision made possible a decision on summary judgment. They might have had even more importance, or at least been of more benefit to Hutton, in connection with the common law and other statutory counts not based on Section 12.

Certainly some of the delays in this case were due to actions by Hutton. Nevertheless, this Court must also in fairness say that another factor was the reluctance of the attorneys on both sides to cooperate with each other, even to the extent of their being unable to reach agreement on many minor procedural questions. This Court therefore had to be an active referee over a period of quite a few years, and at one juncture found it necessary to appoint a special master to resolve discovery conflicts. To make at this time a post hoc analysis and allocate the blame for delays is an impossible task which would challenge the

ability of a top-flight researcher with a penchant for delving into a mountain of words exceeding, in actual physical volume, the area of many an archeological dig. This Court declines to undertake that task. The only alternative to complete denial of Hopkins' request for imposition of penalties upon Hutton would be to perform a surgical feat by taking a sword and following Solomon's edict: "Divide the living child in two, and give half to the one, and half to the other." KINGS I, 3:24-27. But Solomon ended the incident by not dividing the child. And this Court believes it inadvisable to attempt any division of blame in this case at this time.

Hopkins contends that once all the facts came to light in the discovery process, it was obvious that a finding of Hutton's liability was inevitable. The suggestion is that Hutton showed bad faith by interposing legal defenses. But it must be noted that the principal original thrust of Hopkins' suit was actual fraud alleged on the part of LaPiere. The existence of such fraud is not only not assumed by this Court but is and has been rejected in the summary judgment context in which this Court has acted. Furthermore, Hopkins instituted this action under Sections 10(b) and 15(c)(1) of the '34 Act, Section 12(a) of the '33 Act, and Rules 10b-3 and 10b-5 of the S.E.C., as well as under Section 12(2) of the '33 Act. In addition, there are common law counts. Hutton's defenses, which this Court has rejected with respect to the Section 12(2) count, may not have been so rejected in connection with each of the other counts. Further, with respect to Section 12(2), while this Court was not persuaded by Hutton's arguments, all of those contentions cannot, in this Court's judgment, be classified as frivolous, or as bordering upon bad faith, or as being, *per se*, without legal merit. Under such circum-

stances, this Court holds that it would be improper for it to impose the burden of attorney fees on Hutton and therefore declines so to do.

Hopkins also seeks the imposition of attorneys fees under Rule 37 of the Federal Rules of Civil Procedure because of Hutton's failure to comply with requirements imposed by the discovery rules. Hopkins notes that in 1965 it asked for an order requiring Hutton to pay to Hopkins reasonable expenses including reasonable attorneys fees because of Hutton's refusal to respond, as required by the discovery rules, without substantial justification or good reason. What has been said earlier by this Court in connection with Hopkins' Section 11 request applies with equal force with regard to Hopkins' Rule 37 petition. Both in 1965, and as of this date, the record discloses that it was and is almost impossible totally and entirely to assess blame on one of the parties hereto for a particular controversy between their counsel, whether related to discovery or any other item, including simple matters of scheduling.

Form of Decree

At this Court's request counsel for Hopkins and Hutton negotiated with respect to the form of the decree and the form of the assignments of the production payment and of the letter of guaranty, within the framework of the opinion filed by this Court on August 15, 1968. In so doing, both of the parties noted on the record their respective exceptions to a number of the determinations made by this Court and reserved their rights to appeal with regard thereto. The contentions of the parties with regard to questions pertaining to interest, expenses and attorneys fees have been dealt with *supra*. The parties have agreed upon the

allocation of court costs subject to the right of either or both of them to request a redetermination of such allocation in the event of a remand or reversal of the decree of this Court.

Hutton requested that there be only one re-assignment document and that that document include the assignment of both the production payment and the letter of guaranty. Because rescission aims to restore *status quo*, by reversing intervening acts to the fullest extent possible, and because Hopkins and Trice originally utilized two separate documents, namely, (1) an assignment of the production payment and the overriding royalty interest and (2) a separate letter of guaranty, this Court, while attaching little or no significance to whether there should be one or two reassignment documents, is requiring the use of two separate reassignment documents.

Hutton contends that the warranty in the production payment reassignment document should not be limited to the production payment itself but should extend to the underlying properties. But Hopkins did not purchase any interest in those underlying properties. Therefore, Hopkins' warranty should be limited to what it did or did not do in the exercise of its dominion over what it purchased, namely, the production payment.

Hopkins, on the other hand, contends that it should only have to warrant against those of its own acts of which Hopkins presently has knowledge. Hopkins also takes exception to the refusal of this Court to exclude as possible agents of Hopkins any officer, agent, employee or representative of Trice. This Court is requiring Hopkins to warrant against any contracts or agreements or affirmative acts of Hopkins or its agents. A seller, or a broker in the

shoes of a seller, is certainly entitled, when required to accept a reassignment in the context of a decree of rescission, to know of all contracts, agreements, or affirmative acts entered into or taken by the buyer or its agents, and it is hardly unfair to place upon the buyer the burden of so informing the broker. The buyer, on the other hand, can hardly be asked to warrant against all lack of action.

Whether Trice or any of its officers, agents, employees or representatives at any time acted as agent or agents of Hopkins depends upon whether Hopkins ever constituted Trice or any of Trice's officers, agents, employees or representatives as Hopkins' agents or ever clothed one or more of them with the authority of agent. Neither this Court nor Hutton has any way of knowing whether Hopkins ever so did with regard to Hopkins' interest in the production payment between March 1, 1961 and the date of the decree herein, i.e. December 10, 1968, and whether if Hopkins ever so did, any such agent ever exercised any such authority. If any agent of Hopkins, whether Trice, or one of Trice's officers, agents, employees or representatives, or any other person or entity, ever entered into any agreement or undertook any affirmative act other than those specifically listed in the reassignment documents with regard to the production payment, then Hutton is entitled to claim the benefits of the protection of the warranty set forth in those documents. However, neither the 1961 production payment agreement or anything in the record discloses anything which would appear to constitute Trice or any of its officers, agents, employees or representatives as the agent or agents of Hopkins. But this does not mean that Hutton should be deprived of the opportunity of establishing by evidence at a date or dates sub-

sequent hereto that the contrary was true at one or more times while Hopkins owned the 1961 production payment.

Kamen & Co. v. Paul H. Aschkar & Co.

Since this Court filed its opinion on August 15, 1968, the Supreme Court of the United States has dismissed *certiorari* in *Kamen* under Rule 60[1] of that Court. 382 F.2d 689 (9th Cir. 1967) *cert. granted* 390 U.S. 1942 (March 4, 1968) *cert. dismissed* —— U.S. ——, 21 L.ed 2d 85 (Sept. 3, 1968). In view of the lengthy discussion of *Kamen* in this Court's August 15 opinion, it seemed well herein to note the further and final development with regard to that case.

Dated: December 10, 1968.

/s/ FRANK A. KAUFMAN

United States District Judge

[1] Rule 60 provides, in part:

1. Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for an extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal. [U.S. Sup. Ct. Rule 60, 28 U.S.C.A.].

Decree*

(Filed December 10, 1968)

In accordance with the Opinion of the Court filed August 15, 1968, as supplemented by Opinion to be filed, and upon all of the papers filed by the plaintiff and the defendants with respect to the proposed Decree submitted by plaintiff and, also, with respect to the plaintiff's application for attorneys' fees and expenses pursuant to 15 U.S.C. Section 77k and Rule 37 of the Federal Rules of Civil Procedure, and plaintiff and defendants having been heard on October 4, 1968, it is this 10th day of December, 1968, by the United States District Court for the District of Maryland, hereby

ORDERED, ADJUDGED AND DECREED that:

1. The defendants William E. Hutton; Joseph A. W. Iglehart; James J. Lee; William C. Miller; Earl K. Bassett; John M. Bleakie; Ernest E. Keusch; Benjamin D. Williams; John J. Anglim; Reginald N. Barnard; Justin J. Stevenson, Jr.; J. Logan Burke; James M. Hutton, III; Thomas C. Cafone; Hart Hagin; Clinton J. Coombs; Arthur T. Hamill; James M. Hutton, III, Executor of the Estate of defendant James M. Hutton, Jr., deceased; Robyn B. Hall, Vernon H. Hall, III and Dudley Hall, Executors of the Estate of defendant Vernon H. Hall, II, deceased; and W. E. Hutton & Co. a partnership, shall jointly and severally, forthwith pay to plaintiff, The Johns Hopkins University, the purchase price of the production payment hereinafter mentioned amounting to $1,300,000.00, together with interest, at the rate of six percent (6%) per annum from March 1, 1961, as follows:

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* Incorporated in officially reported opinion, 297 F. Supp. 1165 (D. Md. 1968).

On $1,300,000.00 (the purchase price) from March 1, 1961 to June 19, 1961.

On $1,299,430.81 from June 29, 1961 to July 31, 1961.

On $1,299,394.19 from July 31, 1961 to October 5, 1961.

On $1,298,818.51 from October 5, 1961 to October 31, 1961.

On $1,297,303.18 from October 31, 1961 to December 4, 1961.

On $1,296,816.46 from December 4, 1961 to January 29, 1962.

On $1,296,756.30 from January 29, 1962 to March 12, 1962.

On $1,295,704.80 from March 12, 1962 to April 2, 1962.

On $1,293,909.92 from April 2, 1962 to June 6, 1962.

On $1,291,977.89 from June 6, 1962 to June 30, 1962.

On $1,290,616.72 from June 30, 1962 to October 4, 1962.

On $1,287,387.32 from October 4, 1962 to the date of payment pursuant to this Decree, by defendants to plaintiff, less the aggregate of all income, including all amounts credited to the "primary sum" and to the "additional amounts", received by plaintiff to said date of payment by defendants: on account of the oil and gas production

payment of Trice Production Company, a Delaware corporation, heretofore purchased by plaintiff, and conveyed by Trice Production Company to plaintiff on March 1, 1961, which income aggregates $313,326.52 to the date of this Decree after exclusion from income received of the sum of $3,142.36 paid by plaintiff to the Trustee in Reorganization of Trice Production Company pursuant to Supplement to Assignment of Production Payment dated as of December 31, 1962, and of the sum of $20,302.73 returned by plaintiff to Trice Production Company (Reorganized) pursuant to letter Agreement dated August 2, 1966.

2. Concurrently with and contingent upon the payment to plaintiff of the aforesaid amounts by said defendants, plaintiff, The Johns Hopkins University, shall execute and deliver to defendant, W. E. Hutton & Co., an assignment, in the form attached to this Decree as Exhibit A, defendants to pay any transfer and other taxes and recording fees and expenses which may be imposed by reason of this ordered conveyance.

3. Concurrently with the delivery to W. E. Hutton & Co. of the Assignment referred to in paragraph "2" hereof and contingent upon the payment to plaintiff of the amounts directed to be paid by said defendants in this Decree, the plaintiff shall also deliver to defendants: (a) a set of every agreement and division order mentioned in the Assignment, of which the plaintiff has copies, together with a representation that the documents delivered are all of such documents of which plaintiff has knowledge; (b) a binder of all of the closing documents received by plaintiff in the consummation of the production payment referred

to in paragraph "1" hereof, together with a representation that these are the closing documents and all of them; and (c) an Assignment of all of plaintiff's right, title and interest, if any, to 2,500 shares of stock in the Trice Production Company (Reorganized) referred to in the Plan of Reorganization of the Trice Production Company; and (d) an Assignment in the form attached hereto as Exhibit B of all of plaintiff's right, title and interest under a certain letter from Trice Production Company to The Johns Hopkins University dated February 23, 1961.

4. The plaintiff's application for attorneys' fees and expenses pursuant to 15 U.S.C. Section 77k and Rule 37 of the Federal Rules of Civil Procedure be and the same hereby is in all respects denied.

5. Costs in the amount of $10,466.14 are hereby allowed to plaintiff and shall be paid by the defendants, jointly and severally.

6. Provided defendants fully comply with this Decree, the second, third, fourth, fifth, sixth and seventh Counts of the Amended Complaint shall be dismissed as moot.

7. This Court retains jurisdiction solely for the purpose of supervising compliance with this Decree, including the Assignment provided for herein.

/s/ FRANK A. KAUFMAN
United States District Judge

Exhibit A

ASSIGNMENT OF PRODUCTION PAYMENT AND NET PROFIT OVERRIDING ROYALTY INTEREST

STATES OF LOUISIANA, OKLAHOMA AND TEXAS
PARISH OF VERMILION IN LOUISIANA; COUNTIES OF CARTER AND CLEVELAND IN OKLAHOMA; AND COUNTIES OF BORDEN, BRAZORIA, GRAYSON, JACK MATAGORDA, RUSK AND SMITH IN TEXAS

Pursuant to Decree of the United States District Court for the District of Maryland, entered December 10, 1968, in proceedings entitled "The Johns Hopkins University, Plaintiff, v. James M. Hutton, Jr., et al., Defendants", Civil Action No. 15098, and in consideration of the payments from W. E. Hutton & Co., a partnership, and others, to The Johns Hopkins University, a corporation of the State of Maryland (hereinafter referred to as the "Assignor"), provided by said Decree, the receipt and sufficiency of which are hereby acknowledged, Assignor does hereby grant, bargain, sell, convey, transfer, setover, assign and deliever to W. E. Hutton & Co. (hereinafter referred to as the "Assignee"), its succesors and assigns forever all of Assignor's right, title and interest in the production payment and net profit overriding royalty interest acquired by Assignor from Trice Production Company, a corporation of the State of Delaware, by Assignment of Production Payment and Net Profit Overriding Royalty Interest dated February 23, 1961, which is incorporated herein and attached hereto as Exhibit A-1.

Assignor warrants that there have been no contracts or agreements executed by Assignor or affirmative acts

Exhibit A

by Assignor, or its agents, with respect to the aforementioned Production Payment and Net Profit Overriding Royalty Interest assigned under date of February 23, 1961, except the following:

1. Agreement with Transcontinental Pipeline Corporation, Marathon Oil Company, et al, dated as of February, 1963, with respect to the Nunez lease. Executed by Assignor March 13, 1963.

2. Letter Agreement with Marathon Oil Company with respect to the Nunez 1-A well, executed by Assignor March 14, 1963.

3. Supplement to Assignment of Production Payments dated as of December 31, 1962.

4. Letter Agreement of August 2, 1966 between Assignor and Trice Production Company (Reorganized) consisting of two letters of that date, one from Venable, Baetjer and Howard to Trice Production Company (Reorganized) and one from Carrington, Johnson & Stephens to the same addressee.

5. Ratification Agreement with respect to the Ruth Dugger lease and the Shamburger Lake unification executed on or about January 22, 1963.

6. And the following division orders:

A. *Lee Tipps Estate Unit* to Lone Star Gas Co. about November 11, 1965.

Exhibit A

B. *J. W. Hughes Unit* to Union Texas Petroleum Company about August 31, 1962; to Continental Oil Company about September 1, 1965 and about February 1, 1968; and to Trice Production Company about July 22, 1965.

C. *John Swinney, Well No. 1,* to Cities Service Gas Corporation about November 18, 1966.

D. *Pone Gas Unit No. 1* to Humble Oil and Refining Company about March 18, 1963.

E. *Letha Hester* to Sinclair Crude Oil Co. about August 6, 1962; to Sinclari Refining Company about July 7, 1965 and about January 13, 1966 (Ratification); to Signal Oil and Gas Company about August 17, 1962 and about February 28, 1966; and to Texas Pacific Oil Company about October 6, 1965.

F. *Quinnie Dumas* to Sinclair Crude Oil Company about August 6, 1962; to Sinclair Refining Company about September 17, 1965 and about January 13, 1966 (Ratification); to Signal Oil and Gas Company about August 17, 1962.

[There shall be added to the Assignment before execution a list of acts subsequent to the date of the entry of the decree up to the date of the actual transfer.]

Assignor does hereby bind itself, its successors and assigns, to Assignee and to it successors and assigns to warrant and defend all and singular the aforementioned Assiment of Production Payment and Net Profit Overriding Royalty Interest dated February 23, 1961 against every person whomsoever making any claim to the same or any part thereof by, through or under Assignor, except

any such person making any claim pursuant to any one or more of the documents or affirmative acts listed in the preceding paragraph hereof.

Assignor agrees that, upon request of Assignee, Assignor will deliver promptly at the expense of Assignee, proper authorizations and instructions to all present and named purchasers of oil and gas from the properties covered by said production payment or by any of the documents hereinabove listed, to make payments to the Assignee from the effective date of this assignment.

Upon written request of Assignee, its successors or assigns, Assignor, its successors or assigns, will execute and deliver such further instruments and documents as Assignee, its successors or assigns, may reasonably request in order to make this Assignment fully effective.

This Assignment shall be effective from and after the date hereof.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed by its Vice President for Administration and its corporate seal to be affixed, duly attested, this day of , 196 .

THE JOHNS HOPKINS UNIVERSITY

By: .....
Vice President for Administration

ATTEST:

.....

[Corporate Seal]

Witnesses to both of the
above signatures:

.....

.....

Exhibit A

STATE OF MARYLAND
CITY OF BALTIMORE

Louisiana

BEFORE ME appeared Bruce J. Partridge, to me personally known, who, being by me duly sworn, did say that he is a Vice President for Administration of THE JOHNS HOPKINS UNIVERSITY, the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed in behalf of said corporation by authority of its Board of Directors, and that such person acknowledged said instrument to be the free act and deed of said corporation.

Oklahoma

BEFORE ME personally appeared Bruce J. Partridge, to me known to be the identical person who subscribed the name of THE JOHNS HOPKINS UNIVERSITY to the foregoing instrument as its Vice President for Administration and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

Texas

BEFORE ME personally appeared Bruce J. Partridge, known to me to be the person whose name is subscribed to the foregoing instrument, and known to me to be the Vice President for Administration of THE JOHNS HOPKINS UNIVERSITY, a corporation, and acknowledged to me that he

executed said instrument for the purposes and consideration therein expressed, and as the act and deed of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS day of , 196 .

.....

Notary Public in and for
Baltimore City, Maryland.

*Exhibit A-1**

17184

ASSIGNMENT OF PRODUCTION PAYMENT AND NET PROFIT OVERRIDING ROYALTY INTEREST

DATED
FEBRUARY 23, 1961

STATES OF LOUISIANA, OKLAHOMA AND TEXAS

PARISH OF VERMILION IN LOUISIANA; COUNTIES OF CARTER AND CLEVELAND IN OKLAHOMA; AND COUNTIES OF BORDEN, BRAZORIA, GRAYSON, JACK, MATAGORDA, RUSK AND SMITH IN TEXAS

RECITALS:

The following facts are true and correct:

Recital A. Trice Production Company (hereinafter sometimes called "Trice"), a Delaware corporation having valid and subsisting permits to do business in the States of Louisiana, Oklahoma and Texas, with its principal office in Longview, Gregg County, Texas, is the owner of the oil, gas and mineral leasehold estates and other oil, gas and mineral interests (all of which are herein sometimes called the "Contract Properties") described in Annex I and Annex II which are attached hereto and made a part hereof.

Recital B. Trice executed and delivered to Oilco, Inc., an Assignment of Production Payment (hereinafter sometimes called the Oilco Production Payment) dated October 6, 1960, assigning to Oilco, Inc., a production payment in the primary amount of $1,375,000.00 plus certain additional amounts including an amount equivalent to interest

* This is also known as D. Ex. 73.

at the rate of 6% per annum on the monthly unpaid balances of such primary amount payable out of ninety per cent (90%) of the proceeds of production from Trice's properties described in Annex I attached hereto. Such Assignment of Production Payment dated October 6, 1960, has been filed for record in the various states shown below in the county or parish shown in Column (1) below, in the Book or Volume shown in Column (2) below, at the page shown in Column (3) below and in the Records shown in Column (4) below:

Column (1) *County or Parish*	*Column (2)* *Book or Volume*	*Column (3)* *Page*	*Column (4)* *Records*
	LOUISIANA		
Vermilion Parish	430	301	Conveyance
	Entry No. 152536		
	OKLAHOMA		
Carter County	404	245	Records
Cleveland County	346	2	Records
	TEXAS		
Borden County	96	347	Deed Records
Brazoria County	776	509	Deed Records
Grayson County	921	412	Deed Records
Jack County	251	3	Deed Records
Matagorda County	358	425	Deed Records
Rusk County	703	474	Deed Records
Smith County	992	269	Deed Records

Reference is here made to such Assignment of Production Payment dated October 6, 1960, and the record thereof for a complete description of the terms and provisions thereof.

Recital C. Trice desires to assign and convey to The Johns Hopkins University, a Maryland corporation (here-

inafter sometimes called "Johns Hopkins") a production payment and certain net profit overriding royalty interests in, under and out of (and that may be produced, saved and sold from) all of the Contract Properties subject, as to the properties described in Annex I, to the Oilco Production Payment.

Now, Therefore, for and in consideration of Ten Dollars ($10.00) cash in hand paid and other good, valuable and serious considerations, the receipt and sufficiency of all of which is hereby acknowledged, Trice Production Company does hereby grant, bargain, sell, assign, transfer and set over unto The Johns Hopkins University the production payment interest and net profit overriding royalty interests hereinafter described in and to the oil, gas and other minerals in and under and that may be produced, saved and sold from the Contract Properties, or allocable thereto, if unitized, from and after the effective date hereof.

To Have and to Hold unto Johns Hopkins, its successors and assigns, forever, subject to the terms and conditions, exceptions, reservations, covenants, and agreements hereinafter set forth.

ARTICLE I

Production Payment

Section 1. Trice does by these presents grant, bargain, sell, assign, transfer and set over unto Johns Hopkins as a production payment undivided percentages, as hereinafter set out, of all the oil, gas and other minerals in and under and that may be produced, saved and sold from

the Contract Properties or allocable thereto, if unitized, for the time (and effective separately as to those Contract Properties described respectively in Annex I and Annex II) hereinafter set out, until from the proceeds of the sale of such oil, gas and other minerals, Johns Hopkins shall have received free of cost and expense, over and above the aggregate amount of all production severance, and other similar taxes charged against or measured by the production of oil, gas and other minerals, the aggregate of the following:

(a) The full net sum of One Million Three Hundred Thousand Dollars ($1,300,000.00) (hereinafter called the "primary sum"); plus

(b) An amount, if any, equal to all ad valorem taxes and other similar taxes assessed against and paid by Johns Hopkins and the amount of any penalty or interest on any such tax or penalty to the extent paid by Johns Hopkins with respect to the interests hereby granted; plus

(c) An Additional Amount as set forth in Section 4 of this Article I.

The undivided percentages of the oil, gas and other minerals herein granted shall be as follows:

(x) As to those Contract Properties described in Annex II only, an undivided ninety per cent (90%) from the effective date hereof until the date upon which the Oilco Production Payment is liquidated and terminated;

(y) As to all of the Contract Properties described in Annex I and Annex II, an undivided eighty

per cent (80%) from and after the date upon which the Oilco Production Payment is liquidated and terminated until the production payment hereby granted is liquidated and terminated as herein provided.

Section 2. The proceeds of the sale of oil, gas and other minerals which are received by Johns Hopkins on or before the 26th day of each calendar month and after the 26th day of the preceding calendar month shall be applied on the 26th day of each calendar month, first to the satisfaction of the amount provided for in paragraph (c) of Section 1 of this Article I, next to the amount, if any, provided for in paragraph (b) if such Section 1, and the remaining proceeds, if any, shall be applied to the satisfaction of the unpaid balance of the primary sum.

Section 3. All gross production, severance, pipeline, regulating, gathering, occupation, and other similar taxes imposed with respect to or measured by the production from the Contract Properties shall be deducted each month from the proceeds of the sale thereof and only the amounts remaining after such deduction shall be applied as above provided in Section 2 of this Article I.

Section 4. The Additonal Amount referred to in paragraph (c) of Section 1 of this Article I shall be equivalent to interest from the effective date hereof at the rate of six per cent (6%) per annum on the monthly unpaid balance of the primary sum specified in paragraph (a) of such Section 1 (including any amounts restored to the primary sum as provided herein from the date of such restoration), and on the amount, if any, referred to in

paragraph (b) of such Section 1 from the date of each outlay under such paragraph (b). Such Additonal Amount shall be calculated in the same manner as interest on the bank basis is calculated, i.e., the actual number of days divided by 360.

Section 5. If any of the proceeds of the sale of oil, gas and other minerals attributable to the production payment hereby granted shall be withheld for any reason whatsoever, then such proceeds shall not be deemed to have accrued to Johns Hopkins until such proceeds have actually been received by Johns Hopkins; or, if at any time either before or after the receipt of the full net aggregate amount above provided for in Section 1 hereof, Johns Hopkins shall be compelled to pay over the proceeds from the sale of any such oil, gas and other minerals theretofore received or to make any payment on account of oil, gas and other minerals taken by Johns Hopkins in kind, the amount of such proceeds or such payment (plus all amounts which Johns Hopkins shall be compelled to pay in the nature of interest, damages and penalty) shall not be deemed to have accrued or be attributable to Johns Hopkins and shall be restored to the primary sum and liquidated and paid in the same manner.

Section 6. Johns Hopkins shall look solely to the oil, gas and other minerals in and under and that may be produced, saved and sold from the Contract Properties for the satisfaction and discharge of the production payment hereby granted, and Trice shall never be personally liable for the payment and discharge thereof; provided, however, nothing contained in this section shall relieve Trice of its liability to respond in damages for any breach

of any of the covenants, agreements and undertakings herein made by Trice.

Section 7. No interest of Trice in any contract appurtenant to the operating rights with respect to the Contract Properties, nor any interest in any revenues arising otherwise than through the production and sale of oil, gas and other minerals from the Contract Properties is or shall be included as part of the production payment hereby granted.

Section 8. None of the development or operating costs or other similar expenses incurred in operating and developing the Contract Properties or in treating or storing the oil, gas and other minerals produced therefrom, nor any part of any royalty or other burden (except the Oilco Production Payment which is an additional burden) shall be borne by Johns Hopkins, and Trice shall hold and save Johns Hopkins harmless from all such costs, expenses and liabilities.

Section 9. That portion of the oil, gas and other minerals hereby assigned to Johns Hopkins shall be owned by Johns Hopkins in place and shall be delivered to the credit of Johns Hopkins at the well or into the pipeline or pipelines serving the Contract Properties, to be sold and disposed of by Johns Hopkins as it sees fit, except as limited by a unitization, operating or similar agreement or gas sales contract in effect as to the Contract Properties on the effective date hereof; provided, however, that Trice shall, nevertheless, until otherwise instructed in writing by Johns Hopkins, continue to deliver or cause to be delivered to the credit of Johns Hopkins and free of cost to Johns

Hopkins all such oil, gas and other minerals owned by Johns Hopkins at the well or into the pipeline or pipelines serving the Contract Properties, to the same party taking or receiving Trice's interest in the production from the Contract Properties and on the same terms and conditions.

Section 10. Except as set forth in Section 2 of Article IV hereof, no loss or failure of title to the Contract Properties shall have the effect of reducing the undivided percentage of the oil, gas and other minerals devoted to this production payment hereby granted or the amount thereof, nor shall any such loss or failure of title create any set off or other prejudice to Johns Hopkins, its successors and assigns, and this payment shall continue in full force and effect to the extent of the full stipulated undivided percentage thereof as applied to the Contract Properties, the title to which shall not have failed or been lost.

Section 11. Trice shall cause to be paid promptly all gross production, pipeline, severance, and all other taxes, present or future, imposed with respect to the production, gathering, transportation, or sale of oil, gas and other minerals from the Contract Properties and Trice shall render and cause to be paid all ad valorem taxes and assessments of every kind whatsoever, present or future, levied upon or assessed against the Contract Properties before the same shall become delinquent. In the event any tax or assessment is not paid by Trice when due and a penalty therein is charged by the tax authorities, then the amount of any such tax or penalty plus any interest thereon not paid by Trice shall be part of the amount described in paragraph (b) of Section 1 of this Article I.

Section 12. When Johns Hopkins, its successors and assigns, have received in full all of the amounts specified in Section 1 of this Article I, then the production payment hereby granted shall terminate, and in that event Johns Hopkins agrees upon request to execute and deliver all necessary and proper acquittances.

ARTICLE II

Net Profit Overriding Royalty Interests

Section 1. For the same consideration Trice does hereby grant, bargain, sell, assign, transfer and set over unto Johns Hopkins as Net Profit Overriding Royalty Interests the following undivided precentages of all the oil, gas and other minerals in and under or that may be produced, saved and sold from the Contract Properties or allocable thereto, if unitized, from and after the date the "Production Payment" herein granted has been liquidated and terminated:

(a) Fifty per cent (50%) until Johns Hopkins has received therefrom a sum equal to the sum of the "Additional Amounts" received by Johns Hopkins under the production payment granted by Article I hereof and by Oilco, Inc., under the Oilco Production Payment described in Recital B above, such Additional Amounts being described in Section 4 of Article I hereof and in paragraph 2(e) of Article I of the Assignment of Production Payment dated October 6, 1960, described in Recital B above; and

(b) Thereafter twenty-five per cent (25%) for the remaining life of the Contract Properties,

after deducting therefrom the same respective percentages of all costs of developing, operating, equipping, and maintaining the Contract Properties, including the taxes applicable thereto (except income, franchise and other similar taxes) incurred after the liquidation and termination of the production payment granted to Johns Hopkins hereby and described in Article I hereof, it being the intention of the parties that Johns Hopkins shall receive, as Net Profit Overriding Royalties, the above percentages (a) and (b) of the net profits, if any, as herein defined, realized during the respective periods thereof from the ownership, maintenance, development and operation of the Contract Properties in accordance with the terms and provisions hereof.

Section 2. The Net Profit Overriding Royalty Interests do not include any right, title or interest in any of the placed on the Contract Properties, or in a unit in which personal property, fixtures or equipment now or hereafter any part or parts of the Contract Properties may now or hereafter be included, and the interests hereby granted are exclusively an interest in net profits as herein defined and Johns Hopkins shall look exclusively to the oil, gas and other minerals produced from the Contract Properties for the satisfaction and realization of the Net Profit Overriding Royalties.

Section 3. Trice shall pay all costs and expenses incurred in developing, exploring, operating, equipping, and maintaining the Contract Properties and perform all obligations which it has assumed or undertaken under each operating or other agreement affecting the Contract Properties, and shall pay the operator under each such operating

agreement all costs and expenses which are properly allocated to the Contract Properties and shall cause the Contract Properties to be operated for the production of oil, gas and other hydrocarbons in a good workmanlike manner, in accordance with all applicable Federal and state laws, rules and regulations, in accordance with approved practices in the industry and in accordance with the terms and provisions of the operating agreements covering the Contract Properties, all in the manner that would be employed by a reasonable and prudent operator. Trice shall have exclusive charge and control of the marketing of all oil, gas and other minerals allocable to the Net Profit Overriding Royalty Interests and shall market such production at the same time and on the same terms as it markets its own share of the production from the Contract Properties and shall collect and receive the proceeds from the sale of such production.

Section 4. Immediately upon the termination and liquidation of the production payment hereby granted, Trice shall establish a Net Profits Account and maintain the same in accordance with good accounting practices, The books pertaining to the Net Profits Account shall be open at all reasonable times for examination, inspection, copying and auditing by Johns Hopkins or its representatives.

Section 5. Into the Net Profits Account shall be credited the proceeds of all oil, gas and other minerals accruing to the Contract Properties after the production payment hereby granted has been terminated and liquidated. All such proceeds shall be deposited in a separate bank account styled "Trice Production Company Trust Account—Johns Hopkins" and all funds in such account shall be

held in trust by Trice for the benefit of Johns Hopkins and Trice as their interests appears under the provisions hereof.

Section 6. Against the Net Profits Account shall be charged the following costs and expenses which are incurred after the production payment hereby granted has been terminated and liquidated to the extent such costs and expenses are properly allocable to the Contract Properties under sound accounting practices:

(a) Actual amounts expended by Trice for all direct labor (including fringe benefits), transportation, and other services necessary for exploring, developing, equipping, operating, and maintaining the Contract Properties and of all materials, equipment and supplies purchased by Trice and used on any of the Contract Properties and of such services, materials, equipment and supplies for any unit or units in which any part or parts of the Contract Properties is now or hereafter included; and any amounts charged to Trice for adjustment of investment in connection with the creation of any such unit or units; and that portion chargeable to Trice with respect to the Contract Properties for any amounts paid to any operator or receivable by Trice itself as operator (in lieu of overhead, administrative or other indirect costs) under any operating contract relating to any of the Contract Properties or any unit in which any of the Contract Properties may be included;

(b) Damages or losses suffered by Trice with respect to any one or more of the Contract Properties or

unit interests referred to in paragraph (a) of this Section 6 caused by fire, floods, storms or from any other cause not controllable by Trice in the exercise of reasonable diligence;

(c) Expenses of litigation, liens, judgments, liquidated liabilities and claims incurred and paid by Trice involving any of the Contract Properties or incident to the development, exploration, operation or maintenance thereof provided that each such expense arose at such time and under such circumstances that the cause thereof did not constitute a loss or failure of title subject to the provisions of Section 2 of Article IV hereof;

(d) All taxes (except income, franchise, or other similar taxes) paid by Trice for the benefit of the parties hereto with respect to the Contract Properties, including, but not limited to, ad valorem, property, production, occupation and any other taxes assessed against the Contract Properties;

(e) Insurance premiums paid by Trice for insurance carried with respect to the Contract Properties or any unit in which a part of the Contract Properties is included at any time or on any personal property or equipment situated thereon or used in connection therewith together with all expenditures incurred and paid in settlement of any and all losses, claims, damages, judgments, and other expenses including reasonable legal fees relating to the Contract Properties or operations thereof;

(f) A reasonable charge for overhead to cover the proportion thereof which is properly allocable to

the Contract Properties, including, but not limited to, compensation or salaries paid to officers or employees of Trice whose time is not allocated directly to the Contract Properties, office expense of Trice and district and camp expense of Trice which is not properly allocated directly to the Contract Properties, provided that no such charge shall be receivable by Trice as to any property with respect to which it is the operator under any operating agreement providing a charge for overhead or administrative expenses and that such charge as to any property with respect to which Trice is not the operator shall not exceed that proportion of Four Hundred Dollars ($400.00) per month per drilling well and Fifty Dollars ($50.00) per month per producing well which that part of the net working interest of such property included within the Contract Properties bears to the full net working interest;

(g) All other expenditures reasonably incurred by Trice for the necessary or proper development, exploration, maintenance and utilization of the Contract Properties;

(h) A charge of six per cent (6%) interest per annum on the unliquidated balances under paragraphs (a) through (g) of this Section 6 computed monthly on the bank basis, the number of days divided by 360.

Section 7. The charges provided in Section 6 of this Article II shall be reduced by the following:

Exhibit A-1

(a) The proceeds of the sale or salvage of equipment installed on the Contract Properties, the acquisition of which has been charged against said Net Profits Account (and for the purpose hereof the use of any such equipment by Trice of any property other than the Contract Properties shall be treated as a sale at the fair market value at the time of its removal from any of the Contract Properties), it being understood the right to sell or to salvage said equipment shall be left to the sole discretion of Trice, and the only duty imposed upon Trice is to give credit to the Net Profits Account in event of sale or salvage of said equipment;

(b) The proceeds of all insurance collected by Trice as a consequence of the loss or damage to any one or more of the following: the Contract Properties or any part thereof or interest therein or any unit or units, which part of the Contract Properties now or hereafter is included, or the personal property or equipment located thereon which has been acquired after the commencement of the Net Profit Overriding Royalty Interests and the acquisition thereof has been charged to the Net Profits Account;

(c) The proceeds of all judgments and claims collected by Trice involving any of the Contract Properties or any part thereof included in a unit or any of the personal property or equipment located thereon or any other property the cost of which has been charged to the Net Profits Account;

(d) Any other thing of value received by Trice as a result of its ownership (as distinguished from its operation) of the Contract Properties, such as dry hole or bottom hole contributions (either in cash, property, or acreage) received by Trice by reason of the drilling of a well on any of the Contract Properties.

Section 8. All credits to the Net Profits Account shall immediately be applied first to interest on the unliquidated balances of the charges made thereto under paragraphs (a) through (g) of Section 6 of this Article II, and then to the unliquidated balances of the charges made thereto under such paragraphs (a) through (g). The total net profits from the Contract Properties (or the total net losses, as the case may be) shall be determined by deducting the total charges properly made against the Net Profits Account from the total credits properly made into it, and Johns Hopkins shall participate in Johns Hopkins' undivided percentage of the net profits derived from the Contract Properties as herein provided only after and while all charges, debits, and costs properly charged against the Net Profits Account shall have been paid and a credit balance shall exist therein as of the date of distribution from such Net Profits Account. It is understood and agreed that the credit items provided for in Section 7 of this Article II shall be taken into account solely for the purpose of determining whether or not net profits exist, and that Johns Hopkins shall have no right, title or interest therein and that all payments made to Johns Hopkins on account of the Net Profit Overriding Royalties shall be made entirely and exclusively out of the proceeds of production from the Contract Properties.

Section 9. Within two (2) months after the last day of each calendar month, Trice shall furnish to Johns Hopkins a detailed statement clearly reflecting the condition of the Net Profits Account as of the close of business on the last day of such calendar month. Any deficit or loss reflected by any such statement shall be carried forward for the next and succeeding months, until such defit or loss has been liquidated. In case a net profit is reflected by any such statement, payment to Johns Hopkins of Johns Hopkins' undivided percentage of the net profits (as is applicable under Section 1 of this Article II) shall be enclosed with such statement, and Trice shall be credited with the remaining percentage thereof, so as to extinguish any credit balance existing at the end of any month. If at the expiration of two (2) years from the rendition of a particular statement Johns Hopkins has made no objection to the items reflected thereon or as to debits or credits upon which such items are based, such statement shall be conclusively deemed to be correct for all purposes, and Trice shall no longer be required to maintain any records in connection therewith or be liable for any error with respect thereto.

ARTICLE III

Covenants and Agreements of Trice

Trice, for itself, its successors and assigns, covenants and agrees as follows:

Section 1. That Trice, at its own cost (irrespective of who may be the operator of any of the Contract Properties) will cause:

(a) Each lease, as to which all or some part of the interest of the lessee thereunder constitutes a

portion of the Contract Properties, and each and every right of way, easement or privilege necessary or appropriate to the operation of each such lease or other part of the Contract Properties to be kept in full force and effect by the payment of whatever sums may become payable and by the performance of whatever obligations may become performable on the part of Trice with respect thereto;

(b) Each such lease or part of the Contract Properties to be operated in a good and workmanlike manner, and in the manner most approved in the field in which it is situated, so that each producing well shall continue to produce to the extent of its capacity, and within the limits of economic operation, the full daily allowable of oil and distillate therefrom, and, to the extent that a market exists, the full daily allowable of gas therefrom;

(c) All valid laws and all valid orders and regulations of each regulatory authority having jurisdiction in the premises to be complied with in all operations;

(d) All liabilities of any nature, including all liabilities for labor and material and equipment incurred in, or arising from the administration or operation of any and each such lease or item of the Contract Properties to be paid punctually;

(e) Every part of the Contract Properties to be guarded from removal, destruction and damage, and to be protected from the commission of any act, other than the operation of the Contract

Properties as hereby contemplated, as a result of which the value of any part of the Contract Properties may be lessened; Trice and the Contract Properties are to be insured against such risks as are usually insured against by prudent operators under the same circumstances; and

(f) All presently existing royalties, overriding royalties and payments out of production of record affecting the Contract Properties to be paid promptly when due.

Section 2. That Trice will furnish, or cause to be furnished, to Johns Hopkins such reports as may reasonably be requested by the latter with respect to the Contract Properties, and the operation thereof, and the production therefrom, and also such other information regarding the affairs and financial condition of Trice as Johns Hopkins may reasonably request. As soon as practicable after the close of each fiscal year, but not later than one hundred and twenty (120) days after the close of such year, Trice shall have a full and complete audit made of the Net Profits Account by the accounting firm of Peat, Marwick, Mitchell & Co., or some other nationally known accounting firm of its selection and satisfactory to Johns Hopkins, and shall furnish to Johns Hopkins a true and correct copy of such firm's report.

Section 3. That Trice will not consent to the abandonment of any portion of the Contract Properties, unless such portion of the Contract Properties in the hands of an owner of a full seven-eighths (7/8ths) working interest would no longer be capable of producing oil, gas or other minerals in commercial quantities. It is the intention hereof that

Trice will be required to, and Trice covenants and agrees to, operate the Contract Properties or cause them to be operated to their economic limit as though any outstanding production payments and overriding royalty interests (including those hereby conveyed) did not exist and to continue to develop the Contract Properties or cause them to be developed to the extent that a prudent operator would if such production payments and overriding royalty interests did not exist.

Section 4. That Trice will cause to be afforded to any representative of Johns Hopkins or of any mortgagee or trustee of Johns Hopkins the opportunity at all reasonable times to make such inspections of the Contract Properties as such representative shall deem proper.

Section 5. That the terms and provisions of the Oilco Production Payment described in Recital B above shall not be amended or altered to diminish or adversely affect the value of the production payment or Net Profit Overriding Royalty Interests hereby conveyed or the rights herein granted to Johns Hopkins without first obtaining Johns Hopkins' consent in writing thereto.

Section 6. That Trice will not without first obtaining Johns Hopkins' consent in writing convey, transfer or otherwise dispose of any part or all of the Contract Properties, and if Trice should dispose of any part or all of such Contract Properties or if the Contract Properties or any part thereof should be subject to seizure or claim by a trustee or receiver in bankruptcy or any other party by reason of any provision of the Bankruptcy Act of the United States, by reason of any voluntary or involuntary reorganization un-

der any state or Federal statute, by reason of any receivership under the jurisdiction of any court or regulatory body, by reason of any assignment for the benefit of creditors, voluntary or involuntary, by reason of any composition of creditors, voluntary or involuntary, by reason of any attachment, garnishment or other lien or procedure, or by reason of any other procedure, similar or dissimilar to the foregoing, whether voluntary or involuntary or by operation of law, then Johns Hopkins shall have the right either itself (or through any nominee or representative) to take over the entire operation of the Contract Properties and in such event the proceeds of production shall be applied as herein provided by Johns Hopkins, its representative or nominee, after paying all expenses incurred by Johns Hopkins, its representative or nominee, and neither Johns Hopkins nor its representative nor its nominee shall be responsible to Trice or any other person for the operation of such properties except to use good faith in the application of such proceeds in accordance with the provisions of Section 8 of this Article III.

Section 7. To the extent that the terms of any operating, unitization, pooling or other agreement listed in Annex I or Annex II or any restrictions imposed by law prevent Trice from performing any of the covenants and agreements contained herein, performance of such covenants and agreements shall be excused if Trice exerts its best efforts, including, without limitation, the exercise of any rights, powers or privileges available to Trice under any such agreement, to cause all such covenants and agreements to be performed which may be legally performed. Trice warrants and represents that it knows of no provision of law or of any such agreement which would prevent Trice from

complying with any covenant or agreement contained herein. Trice covenants and agrees to refrain from agreeing, without the consent in writing of Johns Hopkins, to any course of action under any such agreement which is contrary to any of the covenants and agreements contained herein.

Section 8. Should Trice fail to perform or cause to be performed any act which Trice is required to perform or cause to be performed under the terms hereof, Johns Hopkins, in addition to its damages and all other remedies available at law or in equity, may, subject to the prior right of Oilco, Inc., as to those Contract Properties described in Annex I, if such failure shall continue after twenty (20) days from the delivery to Trice of written notice thereof (except that no notice shall be required in the event of a violation of the covenants of Section 6 of this Article III), itself perform or cause to be performed such act at Trice's expense, in which event Johns Hopkins may advance funds and incur and pay bills for expenses, for such purpose, and Johns Hopkins shall succeed to all rights of Trice with respect to the possession, operation, and development of the Contract Properties and the use of equipment, machinery, plants, appliances, and personal property pertinent to the operation and development of the same, with right to sell all of the production from the same and to apply the proceeds thereof to the cost and expense of the operation and development of the same, and Trice shall reimburse Johns Hopkins upon demand for all amounts so paid by Johns Hopkins and all amounts expended by Johns Hopkins in connection with the operation and development of said property, together with interest thereon from the date of

expenditure at the rate of six per cent (6%) per annum; and such amounts plus interest shall be included in the damages recoverable by Johns Hopkins for Trice's breach.

ARTICLE IV

MISCELLANEOUS

Section 1. Trice reserves the right and power to pool or combine the acreage affected by the Contract Properties with other lands when in Trice's judgment it is necessary or advisable to do so in order to properly explore and develop the Contract Properties and to promote the conservation of oil and gas in and under and that may be produced therefrom, and to execute unitization agreements, unit operating agreements, and other necessary agreements to facilitate the recovery of oil or gas in the reservoirs in and under the Contract Properties in whole or in part.

Section 2. Any loss or failure of title due to any violation of any covenant hereof or resulting in a breach of any representation or warranty herein contained shall be deemed a failure of consideration and Johns Hopkins shall, fifteen (15) days after written notice to Trice, be entitled to return by Trice of a portion of the purchase price hereof (plus interest at the rate of six per cent (6%) per annum from the effective date hereof to the rate of return) which it is agreed shall be equal to that portion of the $1,300,000.00 arrived at by multiplying the $1,300,000.00 by a fraction whose numerator is equal to the discounted present worth of that portion of the property so lost which is devoted to the production payment and Net Profits Overriding Royalty Interests hereby conveyed and whose denominator is the discounted present worth of that portion of the entire Con-

tract Properties devoted to the production payment and the Net Profit Overriding Royalty Interests hereby conveyed determined in accordance with the Petroleum Consultants, Inc. report of March 1, 1961. From and after the date of such return the interest of Johns Hopkins in the property interest lost shall *pro tanto* be deemed to have been reconveyed to Trice and the primary sum shall be reduced by the amount of such return with the same effect as if such reduced amount had been originally specified herein, and all subsequent calculations shall be made accordingly. The loss of a lease by reason of the cessation of production therefrom in paying quantities shall never be considered a loss or failure of title within the meaning of this Section 2.

Section 3. The Contract Properties and the rights and interests of Johns Hopkins therein may be assigned in whole or in part (and the interest of Trice therein may be assigned with the written consent of Johns Hopkins) and the covenants of Trice and all of the terms and provisions hereof shall be binding upon and shall inure to the benefit of Trice and Johns Hopkins and their respective successors and assigns, and each such covenant, term and provision shall run with and bind the portion of the Contract Properties to which each relates, constituting covenants running with such lands and leasehold estates. If Johns Hopkins, its successors or assigns, shall at any time execute a mortgage or deed of trust covering all or any part of the interests herein conveyed, the mortgagee or trustee shall, if and to the extent that such mortgage or deed of trust so provides, be entitled to exercise all the rights herein conferred upon Johns Hopkins, its successors and assigns.

Section 4. Trice for itself and its successors and assigns does hereby warrant and represent that it has good right, full power, and lawful authority to grant, bargain, sell, transfer, assign and convey the production payment and the Net Profit Overriding Royalty Interests hereby conveyed in the manner hereby done or intended; that Trice is the lawful owner and has good and merchantable title to the Contract Properties free and clear of all liens, encumbrances, adverse claims and burdens except as specifically mentioned in Annex I and Annex II; that the leases and interests described in Annex I and Annex II are valid and existing and that all rents and royalties due and payable under said leases have been duly paid and all conditions necessary to keep said leases in full force and effect have been duly performed; that Trice will warrant and forever defend the title to such interests hereby conveyed to Johns Hopkins against the claims of all persons whomsoever claiming or to claim the same or any part thereof; that Trice will on request of Johns Hopkins promptly correct any defect, error or omission which may be discovered in the contents of this instrument or in the execution or acknowledgment thereof, and will execute and deliver such further instruments and do such further acts as may be necessary or as may be reasonably requested by Johns Hopkins to carry out more effectively the purpose of this instrument and to make subject hereto the interests hereby conveyed or intended to be conveyed.

Section 5. Each covenant, agreement, term and provision is expressly declared to be severable from the remaining covenants, agreements, terms, and provisions hereof and the invalidity of any one shall not affect, impair or invalidate any other covenants, agreement, term, or provi-

sion nor shall the invalidity or unenforceability of any covenant, agreement, term, or provision in any jurisdiction affect the validity or enforceability thereof in any other jurisdiction.

Section 6. Any notice required by the provisions hereof shall be sufficient if sent to the parties hereto by regular mail, postage prepaid, at the following addresses, respectively:

Trice Production Company
P. O. Box 1471
Longview, Texas

The Johns Hopkins University
Homewood
Baltimore 18, Maryland

Section 7. It is understood and agreed that Johns Hopkins shall never be personally liable for the payment of any sum with respect to the Contract Properties or otherwise (except to pay Trice the original purchase price, receipt of which is hereby acknowledged) and it is not the intention of the parties to create, nor shall this instrument be construed as creating, a mining or other partnership or association or joint venture, or to render them liable as partners.

Section 8. This instrument shall be effective as of 7:00 a.m., the 1st day of March, 1961, which date shall be the "effective date" hereof.

THUS DONE AND EXECUTED by TRICE PRODUCTION COMPANY, after due reading of the whole as of February 23, 1961, at Longview, Texas, in multiple counterparts, each of which

shall for all purposes be deemed to be an original and all of which shall together constitute but one and the same instrument, before me Barbara B. Holland, a duly qualified and commissioned Notary Public in and for the County of Gregg, State of Texas, on this the 24th day of February, 1961, in the presence of the undersigned competent witnesses.

TRICE PRODUCTION COMPANY

By /s/ CLIFF TRICE
President

ATTEST:

/s/ GWEN M. FARMER
Secretary

[SEAL]

Witnesses to Both of the Above Signatures:

/s/ MARGARET (Illegible)

/s/ LARUE C. DORSEY

/s/ BARBARA B. HOLLAND
BARBARA B. HOLLAND
Notary Public in and for
Gregg County, Texas

My Commission expires June 1, 1961.

[SEAL]

Exhibit A-1

THE STATE OF TEXAS }
COUNTY OF GREGG }

Oklahoma

BEFORE ME, the undersigned Notary Public in and for said County and State, on this 24th day of February, 1961, personally appeared CLIFF W. TRICE, to me known to be the identical person who subscribed the name of the maker thereof, TRICE PRODUCTION COMPANY, to the foregoing instrument as its President, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Texas

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared CLIFF W. TRICE, President of TRICE PRODUCTION COMPANY, a corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as the act and deed of such corporation for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS 24th day of February, 1961.

BARBARA B. HOLLAND

/s/ BARBARA B. HOLLAND
Notary Public in and for
Gregg County, Texas.

My Commission expires June 1, 1961.
[SEAL]

Exhibit A-1

ANNEX I

I. LOUISIANA LEASES

ITEM (1) MARY NUNEZ UNIT, VERMILION PARISH, LOUISIANA

All of Grantor's right, title and interest in the following described tract of land in Vermilion Parish, Louisiana:

A 321.400-acre tract of land situated in Sections 31 and 65, Township 13 South, Range 3 East, and Sections 6 and 65, Township 14 South, Range 3 East, Vermilion Parish, Louisiana, described by metes and bounds as follows:

BEGINNING at the Southwest corner of Section 31, Township 13 South, Range 3 East, same also being the Southeast corner of Section 36, Township 13 South, Range 2 East;

THENCE running North 2,640 feet along the West line of Section 31, Township 13 South, Range 3 East to the Place of Beginning;

THENCE North 89° 45′ 27″ East 1,550 feet;

THENCE South 16° 46′ 42″ East 2,753.97 feet;

THENCE South 2,641.90 feet to the Southeast corner of said Unit;

THENCE South 45° 47′ 08″ West 3,271.80 feet to the Southwest corner of said Unit;

THENCE North 7,553.63 feet to the PLACE OF BEGINNING, such Unit being the same unit approved and adopted by the Louisiana Department

of Conservation Order No. 367-3 dated June 12, 1958, for the Christellaria-6 Sand Theall Field, Vermilion Parish, Louisiana and the same Unit approved and adopted by the Louisiana Department of Conservation Order No. 367-A-1 dated June 3, 1958, for the Siphonina davisi-1 Theall Field, Vermilion Parish, Louisiana.

The above description is taken from Unit Map prepared and signed by John E. Chance, Registered Civil Engineer, State of Louisiana.

Grantor warrants and represents that its interest is not less than 26% of the total unit gross production, plus an undivided 16% of the total unit gross production attributable to the Mary Nunez A-1 well until Grantor has recovered 100% of the total cost of drilling, completing and equipping its well on the above described tract of land in Vermilion Parish, Louisiana; the interest of Grantor being created by numerous Oil, Gas and Mineral Leases, one of which being that certain Oil, Gas and Mineral Lease dated May 5, 1958, from Mary Nunez Ewell, as Lessor, to Bayou Oil Company, Inc., as Lessee, recorded in Book 360, Folio 401, under File No. 139061 of the Conveyance Records of Vermilion Parish, Louisiana.

It is further understood that the interest above set forth is subject to the following:

(1) That certain gas contract dated November 9, 1959 between Trice Production Company, as Seller, and Transcontinental Gas Pipe Line Corporation, as Buyer;

(2) That certain Operating Agreement dated August 15, 1959 wherein Trice Production Company is Operator and Sinclair Oil & Gas Company et al. are Non-operators.

II. OKLAHOMA LEASES

ITEM (2) HARRY JONES, Well No. 1,
CARTER COUNTY, OKLAHOMA

An undivided 48.58278% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Carter County, Oklahoma, from the surface down to the base of the Hunton Lime Formation found at approximately 8,326 feet:

The Southwest Quarter of the Southwest Quarter (SW/4 SW/4) of Section 34, Township 4 South, Range 3 West;

subject to 48.58278% of the burden of (a) a 1/8 of 7/8 overriding royalty, and (b) a 1.72% of 7/8 of 7/8 overriding royalty; which leasehold estate was created by numerous Oil and Gas Leases, one of which was Oil and Gas Lease dated June 11, 1956 from Harry Douglas Jones and wife, as Lessors, to The Carter Oil Company, as Lessee, recorded in Book 328, Page 407 of the Records of Carter County, Oklahoma.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Farmout Agreement dated June 16, 1959 between The Carter Oil Company and Trice Production Company;

(2) That certain Operating Agreement dated January 8, 1960 wherein Trice Production Company is Operator and The Ledges Oil and Gas Corporation et al. are Non-operators;

(3) That certain gas contract dated September 2, 1958 between Signal Oil & Gas Company, as Buyer and Trice Production Company, as Seller, as amended.

ITEM (3) W. W. WOODWORTH ESTATE UNIT, CARTER COUNTY, OKLAHOMA

An undivided 43.41611% of 7/8 of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Carter County, Oklahoma, reducing to an undivided 43.41611% of 13/16 of such 7/8 leasehold estate or working interest after Grantor has recovered 100% of its cost of drilling, completing, equipping and operating the well on the following described tract of land, from the surface down to a depth of 6,977 feet:

The Northeast Quarter of the Northwest Quarter (NE/4 of NW/4) of Section 34, Township 4 South, Range 3 West;

subject to 43.41611% of the burden of the following: (a) a 1/8 of 7/8 of 1/8 overriding royalty; (b) a 1/16 of 7/8 of 1/4 overriding royalty, reducing to 1/16 of 7/8 of 1/4 of 3/4 at such time as Grantor's interest reduces as set forth above; (c) a 1/16 of 7/8 of 19/40 excess royalty; (d) a 1/8 of 8/8 of 1/40 excess royalty; and (e) a 1.72% of 70.91796% overriding royalty, reducing to 1.72% of 65.79101% at such time as Grantor's interest reduces as set forth above; which leasehold

estate was created by several Oil, Gas and Mineral Leases, one of which was dated June 11, 1959 from C. W. Acree, Executor of the Estate of W. W. Woodworth, Deceased, as Lessor, to Trice Production Company, as Lessee, recorded in Book 381, Page 131 of the Records of Carter County, Oklahoma.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated December 22, 1959 wherein Trice Production Company is Operator and Humble Oil & Refining Company is Non-operator;

(2) That certain gas contract dated September 2, 1958 between Signal Oil and Gas Company, as Buyer, and Trice Production Company et al., as Seller, as amended by amendment dated March 21, 1960;

(3) That certain gas contract dated January 30, 1959 between Signal Oil and Gas Company, as Buyer, and Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc., as Seller, as amended by amendment dated January 30, 1959;

(4) That certain Farmout Agreement dated October 19, 1959 between Trice Production Company and Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc.

ITEM (4) JOHN SWINNEY, Well No. 1,
CLEVELAND COUNTY, OKLAHOMA

An undivided 40% of 76.25% of the full 7/8 leasehold estate or working interest covering each and every

interest in the following described tract of land in Cleveland County, Oklahoma, plus an additional 1.2% of 76.25% of such 7/8 leasehold estate or working interest until Grantor has recovered 200% of its cost of drilling, completing and equipping the well on the following described tract of land in Cleveland County, Oklahoma, from the surface down to a depth of 6,561 feet:

> The Northeast Quarter (NE/4) of Section 33, Township 10 North, Range 2 West;

subject to 40% and 1.2%, respectively, of the burden of the following: (a) a 1/16 of 7/8 of 3/16 overriding royalty; (b) a 1/32 of 7/8 of 76.25% overriding royalty; and (c) a 1.72% of 63.60840% overriding royalty; which leasehold estate was created by numerous Oil, Gas and Mineral Leases, one of which was from John Roy Swinney, et ux, as Lessors, to Trice Production Company, as Lessee, dated December 8, 1959, recorded in Book 332, Page 21 of the Records of Cleveland County, Oklahoma, and by Order No. 41231 of the Corporation Commission of the State of Oklahoma, dated December 9, 1959, in Cause No. 12,905.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated November 27, 1959 between Trice Production Company, as Operator, and Anderson-Prichard Oil Corporation, as Non-operator;

(2) That certain gas contract dated November 11, 1959 between Trice Production Company, as Seller and Cities Service Gas Company, as Buyer, as amended by agreement dated February 12, 1960.

Exhibit A-1

III. TEXAS LEASES

ITEM (5) BERT DENNIS, Well No. 1, BORDEN COUNTY, TEXAS

An undivided 40% of the full 13/16 leasehold estate of working interest covering each and every interest in the following described tract of land in Borden County, Texas, plus an additional 4.8% of the full 13/16 leasehold estate or working interest until Grantor has recovered 200% of its cost of drilling, completing and equipping the well on such following described tract of land, from the surface down to a depth of 8,370 feet:

> The North Half of the Northwest Quarter (N/2 NW/4) of Section 11, Township 5 North, T & P R. R. Co. Survey, Block 30;

subject to 40% and 4.8%, respectively, of an overriding royalty of 1.72% of 13/16; which leasehold estate was created by Oil and Gas Lease dated February 16, 1959 from Bert Dennis et al., as Lessors, to Trice Production Company, as Lessee, recorded in Volume 87, Page 155, Deed Records of Borden County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated July 15, 1960, between Trice Production Company, as Operator, and Trice Properties, Inc., et al., as Non-operators.

Exhibit A-1

ITEM (6) R. D. MacDONALD, Well No. 1, BRAZORIA COUNTY, TEXAS

The full 7/8 leasehold estate or working interest covering each and every interest in the following described land in Brazoria County, Texas, from the surface down to a depth of 11,694 feet:

200.6117 acres, more or less, being the remaining portion of a 368.66-acre tract of land described in Volume 146, Page 335, less a 67.68-acre tract of land described in Volume 149, Page 362, and less a 101.5-acre tract of land described in Volume 329, Page 67, all recorded in the Deed Records of the County Clerk of Brazoria County, Texas, and the said tract of land containing 200.6117 acres, more or less, is more particularly described as follows with all bearings and distances based on the Texas Plane Coordinate System, South Central Zone:

BEGINNING at a boat spike found set in an old 1-1/4" iron pipe in a fence line for the west corner of the herein described tract of land, at west corner of said MacDonald 368.66-acre tract, at the south corner of a 300-acre tract, on the southwest line of the John Cummings League, A-57, and on the northeast line of the S. F. Austin Survey, A-26, from which beginning corner the west corner of said 300-acre tract and of said John Cummings League, bears N 47° 58′ 48" W., 3206.08 feet;

THENCE along a marked line with a northwest line of said 368.66-acre tract, with the southeast line of said 300-acre tract within the John Cum-

mings League, N. 41° 42′ 19″ E., 4067.14 feet to a 1-1/4″ iron pipe with a collar found for corner at an interior corner of said 368-66-acre tract, at the east corner of said 300-acre tract and on the southwest line of a 67.68-acre tract from which corner the west corner of said 67.68-acre tract and the south corner of said 101.5-acre tract bears N. 47° 50′ W. 25.3 feet;

THENCE generally along a fence with the southwest line of said 67.68-acre tract, S. 47° 50′ 00″ E., 2151.55 feet to a point for corner in a northeast-southwest fence, 4.6 feet southwest of a fence corner, at the south corner of said 67.68-acre tract and on the southeast line of said 368.66-acre tract;

THENCE along a fence with the southeast line of said 368.66-acre tract, S. 41° 44′ 12″ W. 4060.41 feet to a point for corner in the bend of a shell road, at the south corner of said 368.66-acre tract, on the southwest line of the John Cummings League and on the northeast line of the S. F. Austin Survey, said point being 36.7 feet southwest of a fence corner and 42.9 feet southeast of another fence corner;

THENCE along a fence with the southwest line of said 368.66-acre tract and of the John Cummings League and with the northeast line of said S. F. Austin Survey, N. 48° 00′ 44″ West., 2149.28 feet to the point of beginning, containing 200.6117 acres of land, more or less;

subject to the burden of (a) a 1/8 of 8/8 overriding royalty, (b) a 1/48 of 8/8 overriding royalty, and

(c) a 1.72% of 35/48 overriding royalty; which leasehold estate was created by Oil, Gas and Mineral Lease dated October 20, 1953 from R. D. MacDonald, Jr., and wife, Ruth Jones MacDonald, as Lessors, to J. A. Heath, as Lessee, recorded in Volume 575, Page 221, Deed Records of Brazoria County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain gas contract dated November 17, 1960 between Trice Production Company, as Seller, and Pan American Gas Company, as Buyer.

ITEM (7) H. H. NOLAND, Wells Nos. 2, 3 and 4, GRAYSON COUNTY, TEXAS

An undivided 40% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Grayson County, Texas, reducing to an undivided 40% of 4/5 of such 7/8 leasehold estate or working interest when either of the following events occur: (a) total gross production from all wells drilled by Trice Production Company on the following described tracts (including the excepted tract) averages 37,000 barrels per producing well; (b) total gross income attributable to all wells drilled by Trice Production Company on such tracts averages $96,200.00 per producing well, from the surface down to a depth of 4,906 feet on Well No. 2; from the surface down to a depth of 4,578 feet on Well No. 3 and from the surface down to a depth of 4,562 feet on Well No. 4:

Exhibit A-1

The South Half (S/2) of the 173.25-acre tract in the Ashley McKinney Survey, A-779, described as follows:

BEGINNING in the NW corner of said survey, a stake in center of Sherman and Macomb Road;

THENCE South 981 vrs. with the West line of said survey, to a stake in the center of road;

THENCE East with said road 994 vrs. to SW corner of tract of 2 acres sold by J. B. Viars and wife, to G. F. Cox by Deed recorded in Volume 188, Page 565, Grayson County Deed Records;

THENCE North 991 vrs. to a stake in hedge fence;

THENCE with said fence, 990 vrs. to the beginning, containing 173-1/4 acres, more or less, SAVE AND EXCEPT the following 20 acres around Trice Production Company's No. 1 H. H. Noland well, described as follows:

20 acres of land out of the Ashley McKinney Survey, A-779, Grayson County, Texas, described by metes and bounds as follows:

BEGINNING at the Southwest corner of the A. McKinney Survey, A-779;

THENCE North with the West line of said survey 1367.86 feet to a point for corner;

THENCE N 89° 20′ E 636.40 feet to a point for a corner;

THENCE South 1370.27 feet to a point on the South line of said survey for corner;

THENCE South 89° 33' W with the said South line 636.40 feet to the PLACE OF BEGINNING;

subject to 40% of the burden of the following overriding royalties, which burden shall be reduced by 1/5 when Grantor's interest is reduced as set forth above; (a) a 1/16 of 8/8 overriding royalty for all months during which daily average production per well is less than 25 barrels, increasing to 3/32 of 8/8 overriding royalty for all months during which daily average production per well is 25 barrels or more; and (b) a 1.72% of 13/16 overriding royalty for all months during which daily average production per well is less than 25 barrels, reducing to a 1.72% of 25/32 overriding royalty for all months during which daily average production per well is 25 barrels or more; which leasehold estate was created by that certain Oil, Gas and Mineral Lease dated May 14, 1954, from Lois G. Noland, as Lessor, to The Superior Oil Company, as Lessee, recorded in Volume 762, Page 468 of the Deed Records, Grayson County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain farmout agreement dated June 30, 1959 between Trice Production Company and Samedan Oil Corporation with Operating Agreement attached thereto as Exhibit "A" wherein Trice Production Company is Operator, and Samedan Oil Corporation is Non-Operator;

(2) That certain farmout agreement dated February 13, 1956 between The Superior Oil Company and Samedan Oil Corporation;

(3) That Partial Assignment dated April 3, 1956 from The Superior Oil Company, as Assignor, to Samedan Oil Corporation, as Assignee, recorded in Volume 834, Page 545 of the Deed Records, Grayson County, Texas.

ITEM (8) RUTH YOUNGER, Well No. 1, GRAYSON COUNTY, TEXAS

An undivided 40% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Grayson County, Texas, from the surface down to a depth of 4,202 feet:

20 acres of land, a portion of 102-acre Ruth Younger land located in the Henry Stewart A-1076, A. McKinney A-779 and G. W. Birdwell A-135 Surveys, described by metes and bounds as follows:

BEGINNING 725.80 feet North of the SW corner of the 2 acre Ruth Younger tract described as second tract in lease from Ruth Younger et vir, as Lessor, to Trice Production Company, as Lessee, recorded in Volume 901, Page 378 of the Deed Records, Grayson County, Texas;

THENCE North 1190.98 feet along West boundary line of said 2 acre tract to stake for corner;

THENCE East at 31.50 feet across the East boundary line of 2 acre tract and the East bound-

ary line of said A. McKinney A-779 Survey and continuing East a total of 731.50 feet to stake for corner;

THENCE South 1190.98 feet to stake for corner;

THENCE West at 700.00 feet the East boundary lien of A. McKinney Survey and continuing West a total of 731.50 feet to th place of beginning,

subject to 40% of the burden of the following: (a) a 1.72% of 7/8 overriding royalty; which leasehold estate was created by that certain Oil and Gas Lease dated September 4, 1959 from Ruth Younger, et vir, as Lessors, to Trice Production Company, as Lessee, recorded in Volume 901, Page 378 of the Deed Records of Grayson County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated April 7, 1960 between Trice Production Company, as Operator, and Trice Properties, Inc., et al., as Non-operators.

ITEM (9) BARHAM-KNOX, Well No. 1,
JACK COUNTY, TEXAS

An undivided 61% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tracts of land in Jack County, Texas, from the surface to a depth of 3,168 feet:

36-1/2 acres of land comprising 30.3 acres of the Nancy P. Overby Survey, Abstract No. 452, and 6.2 acres of the W. V. Adams Survey, Abstract

Exhibit A-1

No. 1505, as described in the deed of conveyance from J. A. Monroe to W. L. Weir, as shown of record in Volume 105, Page 417 of the Deed Records of Jack County, Texas, as follows:

FIRST TRACT: 30.3 acres of the Nancy P. Overby Survey Abstract No. 452: BEGINNING at stake in road on South line said Survey, same being NE corner of the J. W. Wolf Survey and NW corner of W. V. Adams Survey; THENCE East 165 vrs. to SE corner of Sam Newman 202-acre farm out of said survey; THENCE North 728 vrs. stake for corner; THENCE West 321 vrs. stake in road; THENCE South 12° 15′ E. 746 vrs. with public road to the place of beginning.

SECOND TRACT: 6.2 acres of the W. V. Adams Survey, Abstract No. 1505: BEGINNING at stake in public road at NW corner of W. V. Adams Survey and NE corner of J. W. Wolf Survey;

THENCE with said road, S. 13° 30′ East 215 vrs., S. 90.4 vrs., S. 1° 30′ W. 100 vrs., S. 6° East 200 vrs. and S. 23° East 166 vrs. to a point in said road 105 vrs. East of the East line of the Mary Franks Survey; THENCE North 761 vrs. to stake in North line of said W. V. Adams Survey; THENCE West 105 vrs. to the place of beginning;

subject to 61% of the burden of (a) a 1/16 of 8/8 overriding royalty, and (b) a 1.72% of 13/16 overriding royalty; which leasehold estate was created by that certain Oil, Gas and Mineral Lease dated November 26, 1958 from Fannie M. Knox, et al., as Les-

sors, to E. B. Barham, Sr., as Lessee, recorded in Book 228, Page 585 of the Deed Records of Jack County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated January 27, 1960 between Trice Production Company, as Operator, and Frances P. Chalmers, et al., as Non-Operators.

ITEM (10) J. R. CLAYTON, Well No. 2,
JACK COUNTY, TEXAS

An undivided 41.8% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Jack County, Texas, from the surface to a depth of 3,352 feet:

> The Northeast Quarter of the Northeast Quarter (NE/4 NE/4) of T. E. & L. Co. Survey No. 3322, Patent No. 466, Vol. No. 23, Abstract No. 745;

subject to 41.8% of the burden of the following: (a) a 1/16 of 7/8 overriding royalty interest; and (b) a 1.72% of 15/16 of 7/8 overriding royalty interest; which leasehold estate was created by an Oil, Gas and Mineral Lease dated September 3, 1959 from J. R. Clayton et al., as Lessors, to Roy Hogan, as Lessee, recorded in Volume 239, Page 406 of the Deed Records of Jack County, Texas.

It is further understood that the interest above set forth is subject to the following:

Exhibit A-1

(1) That certain Operating Agreement dated May 4, 1960 between Trice Production Company, as Operator, and Trice Properties, Inc., as Non-operators.

ITEM (11) BERNICE MILNE, Well No. 1, MATAGORDA COUNTY, TEXAS

The full 5/6 leasehold estate or working interest covering each and every interest in the following described tract of land in Matagorda County, Texas, from the surface to a depth of 9,538 feet:

A 40 acre tract of land out of a 106.28 acre tract called "Second Tract" in Oil, Gas and Mineral Lease from Bernice Irene Milne et vir and Lillian Mae Simpson et vir, as Lessors, to A. H. Wadsworth, Jr., as Lessee, dated March 15, 1955, recorded in Volume 274, Page 66, Deed Records, Matagorda County, Texas, said 106.28-acre tract consisting of 38.5 acres in the James Silvey Survey, Abstract 382, and 67.78 acres in the Hugh S. Stapp Survey, Abstract 479, Matagorda County, Texas, said 40 acres being described as follows:

COMMENCING at the intersection of the east line of Texas State Highway No. 60 with the north line of above described 38.5 acre tract in the James Silvey Survey, Abstract 382, same being the North line of aforesaid "Second Tract";

THENCE East with the North line of said 38.5 acre tract same being the North line of aforesaid "Second Tract", 1490 feet to a point for the NW and beginning corner of 40 acre tract herein described;

Exhibit A-1

THENCE South at right angles to the North line of aforesaid "Second Tract" to a point in the South line of said "Second Tract" for SW corner of tract herein described;

THENCE Southeasterly with the South line of said "Second Tract" a sufficient distance for SE corner of tract herein described so that a line constructed north and parallel to the West line of tract herein described, to the North line of said "Second Tract" for NE corner of tract herein described and thence West with the North line of said "Second Tract" to the place of beginning will contain exactly 40 acres of land;

THENCE from aforesaid SE corner of tract herein described North and parallel to the West line of tract herein described to a point in the North line of "Second Tract" for NE corner of tract herein described;

THENCE West with the North line of said "Second Tract" to the place of BEGINNING, and containing exactly 40 acres of land;

subject to the burden of the following: (a) a 1/12 of 6/6 overriding royalty interest, subject to the right of the owner to convert same into a 1/4 of the full 5/6 working interest after Grantor has recovered all of its cost of d illing, completing, equipping and operating the well on said land, or $200,000, whichever is the lesser; (b) a 2% of 6/6 overriding royalty interest; and (c) a 1.72% of 73% reducing to a 1.72% of 60.5% when and if owner of the overriding royalty interest described in (a) converts same to a working

interest; which leasehold estate was created by that certain Oil, Gas and Mineral Lease dated March 15, 1955, from Bernice Irene Milne, et vir, et al., as Lessors, to A. H. Wadsworth, Jr., as Lessee, recorded in Volume 274, Page 66 of the Deed Records of Matagorda County, Texas, and Oil, Gas and Mineral Lease dated March 22, 1955 from Ada Irene Hurst et al., as Lessors, to A. H. Wadsworth, Jr., as Lessee, recorded in Volume 274, Page 70 of the Deed Records, Matagorda County, Texas.

ITEM (12) F. W. DOLLAR, Well No. 1,
RUSK COUNTY, TEXAS

An undivided 78% of 7/8 of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Rusk County, Texas, from the surface to a depth of 7,275 feet:

A 40-acre tract, being a part of the 49.25 acre tract described below, formed by extending a line parallel to the East line of the 49.25 acre tract described below from the North to the South lines of such 49.25 acre tract at such distance Westerly from the East line of such 49.25 acre tract as to enclose exactly 40 acres; such 40 acres containing within its enclosure the Trice Production Company No. 1 F. W. Dollar Well and being a part of that tract of land in the James McWilliams Survey described as follows:

BEGINNING at the NW corner of a 100-acre tract deeded by W. J. Ferguson to H. L. Griffin; THENCE S 10° E. with WBL of said 100-acre

tract, 244 vrs. to corner of Henderson and Tyler road; THENCE S 44° E. with said road 148 vrs. to corner in same; THENCE N 82-3/4° E. 855 vrs. to corner on EL of the aforesaid 100-acre tract; THENCE N 10° W. with said EBL 341 vrs. to NE corner of said 100-acre tract; THENCE S 80° W. with the NL of said 100-acre tract, 840 vrs. to the place of beginning, containing 50 acres, LESS 3/4 of an acre conveyed by F. W. Dollar and wife, Minnie Dollar, to Emma Marie Dollar Madden by Deed dated September 11, 1950, recorded in Volume 453, Page 130, of the Deed Records of Rusk County, Texas, leaving a balance of 49-1/4 acres;

subject to 78% of 7/8 of the burden of a 1/8 of 8/8 overriding royalty, and also subject to 78% of the burden of a 1.72% of 21/32 overriding royalty; which leasehold estate was created by that certain Oil and Gas Lease dated October 17, 1950, from F. W. Dollar, et ux, as Lessors, to D. E. Stimson, as Lessee, recorded in Volume 458, Page 316 of the Deed Records of Rusk County, Texas;

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated March 9, 1960 between Trice Production Company, as Operator, and John C. Robbins, Jr., as Non-operator;

(2) All of the terms and provisions and conditions of that certain Conditional Assignment from Continental Oil Company to Trice Production Com-

pany and F. R. Jackson which is dated July 8, 1959. Each party receiving any interest or right by this instrument expressly agrees that insofar as concerns the rights and interests acquired by him, he assumes and will perform all of the covenants and obligations (both express and implied) of the above described leases and of the above described Conditional Assignment from Continental Oil Company to Trice Production Company and F. R. Jackson, recorded in Volume 672 on Page 264 of the Deed Records of Rusk County, Texas.

ITEM (13) LEE TIPPS ESTATE UNIT, RUSK COUNTY, TEXAS

An undivided 3/4 of 454.387/588.68 of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Rusk County, Texas, from the surface to a depth of 7,394 feet:

BEING 588.68 acres of land a part of the H. M. Smith and S. P. Burke Surveys, Rusk County, Texas, said 588.68 acres of land being more particularly described as follows:

BEGINNING at a point in the center line of a Farm to Market Road No. 225, said BEGINNING point being on the SE Corner of the Lee Tipps Estate 165.595 acre tract;

THENCE N 84° 54′ W, 754.1 feet, S 89° 18′ W, 4026.9 feet and West 137 feet along a fence on the SBL of the above mentioned Lee Tipps Estate tract to a point in the center of Shawnee Creek;

Exhibit A-1

THENCE in the northern direction along the center of said Shawnee Creek the following courses and distances:

N 32° 46′ E, 301.2 feet; N 59° 29′ W, 124.1 feet; N 5° 32′ E 202.2 feet; N 87° 56′ W, 116.7 feet; N 47° 33′ W. 248.0 feet; S 63° 57′ E, 184.9 feet; N 1° 44′ W, 178.5 feet; S 84° 53′ E, 141.1 feet; N 1° 54′ E, 148.1 feet; N 61° 16′ E, 162.3 feet; N 3° 40′ E, 289.6 feet; N 11° 39′ W, 116.8 feet; S 65° 28′ W, 87.2 feet; N 23° 04′ W, 223.6 feet; S 84° 11′ E, 174.5 feet; N 24° 01′ W, 155.0 feet; N 36° 45′ E, 123.7 feet; S 27° 18′ E, 165.1 feet; S 61° 36′ E, 65.4 feet; N 1° 46′ W, 179.2 feet; N 44° 09′ E, 113.2 feet; N 55° 24′ W, 49.3 feet; N 3° 00′ W, 335.9 feet; S 82° 13′ E, 143.9 feet; N 50° 52′ E, 118.2 feet; N 76° 57′ W, 111.2 feet; N 24° 24′ W, 186.7 feet; S 59° 48′ E, 304.1 feet; N 26° 16′ E, 105.3 feet; N 39° 38′ W, 129.5 feet; N 5° 18′ W, 89.8 feet; N 38° 34′ E, 172.4 feet; N 63° 01′ W, 264.0 feet; N 84° 17′ W, 139.4 feet; N 72° 25′ E, 221.1 feet; N 80° 00′ W, 279.9 feet; N 55° 17′ E, 130.8 feet; N 30° 44′ E, 92.1 feet; N 1° 39′ E, 104.3 feet; N 81° 40′ E, 433.8 feet; N 13° 38′ W, 111.7 feet; N 72° 11′ W, 249.0 feet; N 40° 31′ E, 141.8 feet; to the SE Corner of J. D. Pitts 20.230 acre tract;

THENCE N 60° 37′ W, 2746.9 feet along a fence on the SBL of said Pitts tract to a point on the East side of a county road;

THENCE N 86° 47′ W, 48.2 feet to a point on the West side of a County Road;

Exhibit A-1

THENCE S 77° 37′ W, 200.5 feet along a fence on the SBL of Morris 2-acre tract to a fence corner post on the SW Corner of same for Corner;

THENCE N 14° 26′ W, 171.3 feet along a fence on the WBL of said 2-acre tract to a point in fence for Corner;

THENCE N 51° 08′ E, 346.8 feet to a point on the WBL of the above mentioned County Road for Corner;

THENCE N 63° 13′ E, 1657.8 feet to a point in a fence line on the NBL of L. Gramling tract of land;

THENCE in a SE direction the following courses and distances:

S 55° 47′ E, 1376.1 feet; S 83° 50′ W, 39.1 feet; S 57° 49′ E, 113.1 feet; S 71° 30′ E, 117.3 feet; S 39° 19′ W, 89.9 feet; S 14° 28′ E, 70.0 feet; N 61° 23′ E, 169.2 feet and S 28° 49′ E, 53.8 feet to the NW corner of the F. Brightwell tract of land;

THENCE N 80° 08′ E, 1977.9 feet along a fence on the NBL of said F. Brightwell tract to a point in fence for Corner;

THENCE S 36° 28′ E, 2272.0 feet to a point in the SBL of said F. Brightwell tract, same being on the NBL of Boswell tract of land;

THENCE S 49° 01′ E, 211.0 feet to a point in the EBL of said Boswell tract;

Exhibit A-1

THENCE S 8° 49′ E, 242.2 feet; N 78° 33′ E, 56.9 feet and S 20° 04′ E, 79.3 feet to the SE Corner of said Boswell tract, same being the NE Corner of Armstrong tract of land;

THENCE S 13° 54′ E, 798.9 feet along a fence on the EBL of said Armstrong tract of the SE Corner of same for Corner;

THENCE S 81° 44′ W, 513.5 feet along a fence on the SBL of Armstrong tract to a point on the center line of the above mentioned Farm to Market Road No. 225;

THENCE in a Southerly direction along the center line of said Farm to Market Road the following courses and distances:

S 42° 04′ E, 488.0 feet; S 20° 41′ E, 333.7 feet; S 9° 51′ E, 201.6 feet; S 8° 36′ E, 337.7 feet; S 8° 13′ W, 100.7 feet to a point for corner;

THENCE East 37.5 feet to the most Easterly NE Corner of the above mentioned Lee Tipps Estate, 165.595 acre tract;

THENCE S 14° 24′ E, 330.6 feet; S 9° 23′ E, 313.3 feet and S 10° 00′ E, 187.0 feet along a fence to a fence corner post for Corner;

THENCE N 84° 54′ W, 338.8 feet to a point on the center line of said Farm to Market Road;

THENCE S 7° 25′ W, 231.9 feet to the place of BEGINNING and containing 588.68 acres of land;

subject to the burden of overriding royalties aggregating not more than 08.97976% of the gas produced

and saved from such land; which leasehold estate was created by numerous Oil, Gas and Mineral Leases, including Lease dated April 29, 1954 from Lydia Tipps Haskins, as Lessor to Gilbert S. Johnson, Jr., as Lessee, recorded in Volume 529, Page 115, Deed Records of Rusk County, Texas, which Unit was formed by Declaration of Unitization dated June 16, 1960, recorded in Volume 696, Page 256, Deed Records of Rusk County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated March 14, 1960 between Trice Production Company, as Operator, and Skelly Oil Company and John C. Robbins, Jr., as Non-operators;

(2) That certain farmout letter agreement dated February 2, 1960 by and between Trice Production Company and J. C. Trahan, Drilling Contractor, Inc.

ITEM (14) MATTIE WEATHERFORD UNIT, RUSK COUNTY, TEXAS

An undivided 47/64 of 133/650.75 of the full 7/8 leasehold estate or working interest and 3/4 of 10/650.75 of the full 7/8 leasehold estate or working interest covering each and every interest, as to gas rights only, in the following described tract of land in Rusk County, Texas, from the surface to a depth of 7,464 feet:

All that certain acreage located approximately three miles southerly from the City of Hender-

son, and being portion of the R. L. McDaniel, William Gill, John J. Poe, and William Jackson Surveys, Rusk County, Texas, and more particularly described as follows:

BEGINNING on the NBL of the John Piburn League at the SWC of the said R. L. McDaniel Survey;

THENCE East along the SBL of the said McDaniel Survey approximately 1986 feet to the NEC of the said Piburn League at the NWC of the said William Jackson Survey;

THENCE South along the WBL of the William Jackson Survey, this being the West lines of the Homer Green 33 and 100 acre tracts, 2472 feet, more or less, to the SWC of the said 100 acres;

THENCE East along the SBL of the said 100 acres about 3733.3 feet to the SEC of the said Homer Green 100 acres on the EBL of the said William Jackson Survey;

THENCE North along the EBL of the said William Jackson Survey 1166.7 feet to the NEC of the said Homer Green 100 acres;

THENCE West along the NBL of the said 100 acres 1128 feet to the SWC of the Homer Green 84 acres;

THENCE Northerly with road 2075.0 feet to the South Corner of the Homer Green 3.3 acres;

THENCE North 19 deg. 30 min. West with WBL of said 3.3 acres, 363.1 feet;

Exhibit A-1

THENCE North 2 deg. 30 min. East continuing with said WBL of 3.3 acres 232.2 feet;

THENCE North 3 deg. East 333.3 feet to the NEC of said 84 acres;

THENCE East along the SBL of the John R. Alford Estate tract of 124 acres 2040 feet to the Easterly SEC of the said John R. Alford Estate tract of 124 acres, this being on the EBL of the said John J. Poe Survey;

THENCE North 722.2 feet to the NEC of the said 124 acres, this being the NEC of the John J. Poe Survey and SEC of the Wm. Gill Survey;

THENCE continuing North 1139 feet to the NEC of the J. D. Flanagan 57.1 ac. at the SEC of the J. E. Watkins Estate 100 acres;

THENCE continuing North with EBL said Wm. Gill Survey along the EBL of the said 100 ac. 1322.2 feet (total North call being 3183.4 feet) to its NEC on the SBL of the F. L. James 5 ac.;

THENCE West 615 feet to the SWC of the said 5 acres on the NBL of the said Watkins tract;

THENCE Southwesterly, crossing the said Watkins tract, 2100.0 feet to the NEC of the Mattie Weatherford 26 acres now owned by W. C. Beard;

THENCE West 988.9 feet to the NWC of the said 26 acres, on the WBL of the said Wm. Gill Survey, this being on the EBL of the aforementioned R. L. McDaniel Survey;

THENCE North to the NEC of the James Weatherford et al. 10 ac. as described in Vol. 567 on pages 125 et seq. Deed Records said County;

THENCE West to the EBL of the Lennie Beard et al. 10 ac. tract as described in Vol. 442 on page 423 said Records;

THENCE North 155.6 feet to NEC said Beard 10 acres;

THENCE West to NWC said Beard 10 acres on the EBL of F. F. White 36 acres;

THENCE South to SEC said 36 acres, at NEC F. F. White 50 ac.;

THENCE West 1500.0 feet to NWC said 50 acres on WBL aforementioned R. L. McDaniel Survey;

THENCE South 2761 feet to BEGINNING and containing 650.75 acres, more or less,

subject to the burden of overriding royalties aggregating 01.17381%; which Unit was created by Declaration of Unitization dated May 16, 1960, recorded in Volume 695, Page 353, Deed Records of Rusk County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated May 18, 1960 between J. C. Trahan, Drilling Contractor, Inc., as Operator, and Trice Production Company, et al., as Non-operators;

(2) That certain Supplemental Designation of Pooled Unit dated August 10, 1960 and recorded in Volume

699, Page 197 of the Deed Records, Rusk County, Texas.

ITEM (15) EMMA WINDLE, Well No. 1,
RUSK COUNTY, TEXAS

An undivided 3/4 of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Rusk County, Texas, from the surface to a depth of 7,433 feet:

160 acres of land, situated in the Thomas Jones A-450, H. M. Smith A-702 Surveys, Rusk County, Texas, 3.5 miles S 40 W from Henderson, Texas, described by metes and bounds as follows:

BEGINNING at the SE corner of the H. J. Hunt tract called 2 acres, recorded in Volume 506, Page 449, being the easternmost NE corner of the Emma Windle tract called 43.5 acres described in Volume 30, Page 306, Rusk County Deed Records;

THENCE S 79° 50′ W 300 feet to the SW corner of the H. J. Hunt tract;

THENCE N 5° 14′ W 300 feet to the NW corner of the H. J. Hunt tract;

THENCE S 79° 50′ W to the NW corner of the Emma Windle 43.5 acre tract;

THENCE S 10° E to the SW corner of the Emma Windle 43.5 acre tract, said point being also the NW corner of the Emma Windle 54.5 acre tract;

THENCE S 30° E to the NW corner of the B. M. Duncan tract called 1.96 acres, said point being

in the center of the old Henderson-to-Jacksonville asphalt highway;

THENCE N 60° E to the NE corner of the B. M. Duncan 1.96 acre tract;

THENCE S 30° E. to the SE corner of the B. M. Duncan 1.96 acre tract;

THENCE S 60° W to the NW corner of Emma Windle et al. tract called 20 acres;

THENCE S 10° E to the SW corner of the 20-acre Emma Windle tract in the N line of another 20-acre Emma Windle tract, also being the S line of the Thomas Jones Survey, A-450 and the N line of the Henry M. Smith Survey, A-702;

THENCE S 80° W along said NBL of said 20-acre tract to the NW corner of the Emma Windle 20-acre tract to the center of Turkey Creek;

THENCE downstream with the meanders of said Turkey Creek S 52° 51′ E 373 feet;

THENCE N 79° 30′ E 1696 feet to the E line of the Emma Windle 20-acre tract;

THENCE N 7° 49′ E 282 feet to the S line of the Thomas Jones Survey said point being the SW corner of the Emma Windle 38.7 acre tract;

THENCE N 79° 47′ E 549.4 feet to the SE corner of the Emma Windle 38.7 acre tract;

THENCE N 11° 4′ E with the E line of the Emma Windle 38.7-acre tract 1132.4 feet to a point;

THENCE N 35° 5′ E 500 feet to the S corner of B. M. Duncan tract called 2 acres;

Exhibit A-1

THENCE N 20° W to the NW corner of the Duncan 2 acre tract;

THENCE S 68° W to the SW corner of the Shannon Strong 6.22 acre tract;

THENCE N 29° 19′ W 703.3 feet to the NW corner of the Shannon Strong 6.22 acres;

THENCE N 5° 14′ W to the place of BEGINNING, containing 160 acres, more or less,

subject to the burden of the following overriding royalty interests: (a) 1/16 of 8/8 of 3/4; (b) 1.72% of 3/4 of 13/16; which leasehold estate was created by Oil and Gas Lease dated November 14, 1950 from Emma Windle et al., as Lessors, to D. E. Stimson, as Lessee, recorded in Vol. 460, Page 627, Deed Records of Rusk County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated August 15, 1960 between Trice Production Company, as Operator, and John C. Robbins, Jr., et al., as Non-operators;

(2) All of the terms and provisions and conditions of that certain Conditional Assignment from Continental Oil Company to Trice Production Company and John C. Robbins, Jr., which is dated June 6, 1960. Each party receiving any interest or right by this instrument expressly agrees that insofar as concerns the rights and interests acquired by him, he assumes and will perform all of the covenants and obligations (both express and

implied) of the above-described leases and of the above-described Conditional Assignment from Continental Oil Company to Trice Production Company and John C. Robbins, Jr., recorded in Volume 697, Page 259, Deed Records of Rusk County, Texas.

ITEM (16) RUTH DUGGER, Well No. 1, SMITH COUNTY, TEXAS

An undivided 40% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Smith County, Texas:

29.79 acres of land, more or less, a part of the Malinda Morris Survey, Abstract No. 696, and more particularly described as follows:

BEGINNING on the NB line of the Malinda Morris Survey No. 598, Abstract No. 696 at the NW corner of the S. P. Ford 40-acre tract, an iron stake in the Tyler and Sand Flat Road, sassafras 30 N 75 deg. W 13.5 vrs. as original witness tree;

THENCE South 1/4 East 237 vrs. along in said road to iron stake South of curve of said road near fence, the South Sycamore tree in front yard brs. N 65 W 12 vrs.;

THENCE West 38 vrs. to iron stake in field; Thence North 1/4 deg. W 20 vrs. to iron stake; Thence North 85-1/4 deg. West 168.6 vrs. to an iron stake in field South of fence, the most West apple tree brs. S 65 deg. 10 min. East 3.6 vrs.; Thence South 3.1 vrs. to iron stake in field;

Exhibit A-1

THENCE West 622.8 vrs. to the WB line of the F. T. Hulse 4.9-acre tract and the most North EB line of the S. P. Ford 195.1-acre tract, corner iron stake, RO 16 S 24 deg. 20 min. W 4.1 vrs.;

THENCE North 1/4 West 195.3 vrs. to the NWC of said Hulse 4.9-acre tract and the most N. NE corner of said Ford 195.1-acre tract on the NB line of said Morris Survey, corner an iron stake, PO 14 S 49-1/2 East 5.5. vrs.;

THENCE North 89-1/4 E 828.8 vrs. with the NB line of said Morris Survey to the PLACE of BEGINNING, containing 29.79 acres of land, a part of the Malinda Morris Survey No. 598, Abstract No. 696, variation needle E 8-1/2 deg. on July 5, 1929;

subject to 40% of the burden of the following: (a) a 1/64 of 7/8 overriding royalty, and (b) a 1.72% of 63/64 of 7/8 overriding royalty; which leasehold estate or working interest was created by that certain Oil, Gas and Mineral Lease dated February 15, 1957 from Ruth Dugger and husband, McKinley Dugger, et al., as Lessors, to Trice Production Company, as Lessee, recorded in Book 873, Page 158 of the Deed Records of Smith County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated March 24, 1960 between Trice Production Company, as Operator, and Trice Properties, Inc., et al., as Non-operator.

Exhibit A-1

ANNEX II

I. OKLAHOMA LEASES

ITEM (1) QUINNIE DUMAS LEASE, Well No. 1, CARTER COUNTY, OKLAHOMA

An undivided 58.71678% of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Carter County, Oklahoma, reducing to an undivided 58.71678% of 2/3 of such 7/8 leasehold estate or working interest in the event that Grantor's assignor exercises its option to convert its overriding royalty interest to a working interest after Grantor has recovered 100% of its cost of drilling, completing, equipping and operating the well on such tract described below, from the surface to a depth of 10,330 feet:

The Northeast Quarter of the Northeast Quarter (NE/4 NE/4) of Section 13, Township 5 South, Range 3 West;

subject to 58.71678% of the following: (a) a 1/16 of 7/8 overriding royalty, reducing to 2/3 of 1/16 of 7/8 at such time as Grantor's interest reduces as set forth above; (b) a 1/20 of 7/8 overriding royalty, such override to be extinguished when and if Grantor's interest reduces as set forth above; (c) a 1.72% of 71/80 of 7/8 overriding royalty, reducing to 1.72% of 15/16 of 7/8 of 2/3 at such time as Grantor's interest reduces as set forth above; which leasehold estate was created by that certain Oil and Gas Lease dated January 27, 1955 from Quinnie M. Dumas, as Lessor, to Taft Milford, as Lessee, recorded in Book 305, page 413 of the Records of Carter County, Oklahoma.

It is further understood that the interest above set forth is subject to the following:

(1) That certain gas contract dated January 30, 1959 between Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc., as Seller, and Signal Oil & Gas Company, as Buyer.

(2) That certain Operating Agreement dated January 25, 1960 between Trice Production Company, as Operator, and Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc., as Non-Operator.

ITEM (2) LETHA HESTER LEASE, Well No. 1, CARTER COUNTY, OKLAHOMA

An undivided 59.71678% of the full 7/8 leasehold estate or working interest, reducing to 59.71678% of 2/3 of 19/20 of such 7/8 leasehold estate, plus, 59.71678% of 1/20 of such 7/8 leasehold estate or working interest when and if the holder of the overriding royalty set out below as (b) elects to convert same to a working interest, covering each and every interest in the following described tract of land in Carter County, Oklahoma, from the surface to a depth of 9,568 feet:

> The Northeast Quarter of the Southeast Quarter (NE/4 SE/4) of Section 12, Township 5 South, Range 3 West;

subject to 59.71678% of the burden of the following overriding royalties: (a) 1/16 of 7/8 of 19/20 reducing to 1/16 of 7/8 of 19/20 of 2/3 at such time as Grantor's interest reduces as set forth above; (b) a 1/20 of 7/8 of 19/20, which shall be extinguished when and if Grantor's interest reduces as set forth above; (c) a

1.72% of 78.14844%, reducing to 1.72% of 56.32813% when and if Grantor's interest reduces as set forth above; which leasehold estate was created by several oil, gas and mineral leases, one of which was dated January 26, 1955 from Letha B. Hester, et al., as Lessors, to T. H. McGilless, as Lessee, recorded in Book 306, page 490 of the Records of Carter County, Oklahoma.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated January 25, 1960 between Trice Production Company, as Operator, and Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc. as Non-Operator.

(2) That certain gas contract dated January 30, 1959 between Frankfort Oil Company, a Division of Joseph E. Seagram & Sons, Inc., as Seller, and Signal Oil & Gas Company, as Buyer.

ITEM (3) J. W. HUGHES UNIT,
CLEVELAND COUNTY, OKLAHOMA

An undivided 1/2 of the full 7/8 leasehold estate or working interest covering each and every interest in the following described tract of land in Cleveland County, Oklahoma, from the surface to a depth of 8,347 feet:

The East Half of the Northwest Quarter (E/2 NW/4) of Section 22, Township 9 North, Range 3 West;

subject to the burden of the following: (a) 1/2 of 1/16 of 1/24 excess royalty; (b) 1/32 of 1/2 of 7/8

of 11/24 overriding royalty; (c) 3/32 of 7/8 of 1/2 of 1/2 overriding royalty; (d) 1/16 of 7/8 of 1/2 of 1/2 overriding royalty; (e) 1.72% of 39.57519% overriding royalty; which leasehold estate was created by numerous oil, gas and mineral leases, three of which are as follows: (1) Lease dated April 5, 1957 from J. W. Hughes, as Lessor, to N. E. Howard, as Lessee, recorded in Book 279, page 249 of the Records of Cleveland County, Oklahoma; (2) Lease dated March 29, 1957 from Warren Cemetary Association, a corporation, as Lessor, to N. E. Howard, as Lessee, recorded in Book 283, page 478 of the Records of Cleveland County; Oklahoma; (3) Lease dated February 28, 1959 from Augusta B. Meyer, as Lessor, to N. E. Howard, as Lessee, recorded in Book 319, page 450 of the Records of Cleveland County, Oklahoma.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated April 18, 1960 between Anderson-Prichard Oil Corporation, as Operator, and Trice Production Company, as Non-Operator.

II. TEXAS LEASES

ITEM (4) VERA RONEY LEASE, Well No. 2, JACK COUNTY, TEXAS

An undivided 50.2% of the full 7/8 leasehold estate or working interest, plus an additional 0.6% of such 7/8 leasehold estate or working interest until Grantor has recovered 200% of its cost of drilling, completing, equipping and operating the well on the following described tract of land in Jack County, Texas, from the surface to a depth of 3,332 feet:

Exhibit A-1

The Southeast Quarter (SE/4) of the South 80 acres of the East Half (E/2) of T. E. & L. Company Survey, No. 3321, A-744, as shown by Patent No. 465, Vol. 23, recorded in Vol. T., page 172 of the Deed Records of Jack County, Texas, and containing 20 acres of land;

subject to 50.2% and 0.6%, respectively, of the burden of the following: (a) a 1/16 of 7/8 overriding royalty; and (b) a 1.72% of 15/16 of 7/8 overriding royalty; which leasehold estate was created by that certain oil and gas lease dated July 7, 1958 from J. T. Roney, et ux, Vera Roney, as Lessors, to Roy Hogan, as Lessee, recorded in Volume 228, page 395, Deed Records of Jack County, Texas.

It is further understood that the interest above set forth is subject to the following:

(1) That certain Operating Agreement dated January 12, 1960 between Trice Production Company, as Operator, and Trice Properties, Inc. et al., as Non-Operators.

ITEM (5) PONE GAS UNIT NO. 1,
RUSK COUNTY, TEXAS

An undivided 3/4 of 54.5/692.99 of the full 7/8 leasehold estate or working interest covering the gas rights only in the following described tract of land in Rusk County, Texas, from the surface to a depth of 6,616 feet:

All those certain tracts or parcels of land situated in the John Piburn Survey, A-28, Rusk County, Texas, comprising the Pone Gas Unit No. 1 and described as follows:

Exhibit A-1

BEGINNING at the southeast corner of the John Piburn Survey and the southeast corner of the B. E. Skiles et al. 252.5 acre tract, stake for corner;

THENCE West along the south boundary line of the John Piburn Survey and the south boundary line of the B. E. Skiles et al. 252.5 acre tract to a stake for corner;

THENCE North 593.8 feet, stake for corner;

THENCE West to the southwest corner of the J. L. Eaton et al. 29.10 acre tract, stake for corner;

THENCE Northerly along the west boundary lines of the J. L. Eaton et al. 29.10 acre tract, the John E. Williams et ux 39.27 acre tract, the Lee Williams et ux 48.30 acre tract, and the O. Bernard Williams et al. 75.0 acre First Tract to the northwest corner of the O. Bernard Williams et al. 75.0 acre First Tract, stake for corner;

THENCE East to the east boundary line of the O. Bernard Williams et al. 55.08 acre Second Tract and the west boundary line of the Lee Williams et ux 13.32 acre tract, stake for corner in the center line of a public road;

THENCE N 11° 26′ E along the division line between the O. Bernard Williams et al. 55.08 acre Second Tract and the Lee Williams et ux 13.32 acre tract to a stake for corner in the center line of a public road;

THENCE East across the Lee Williams et ux 13.32 acre tract, the Lee Williams et ux 114.0 acre tract to the West boundary line of the George Barron 54.5 acre tract, stake for corner;

Exhibit A-1

THENCE North along the division line between the Lee Williams et ux 114.0 acre tract and the George Barron 54.5 acre tract to stake at the northeast corner of the Lee Williams et ux 114.0 acre tract, which point is also the northwest corner of the George Barron 54.5 acre tract;

THENCE East along the North boundary line of the George Barron 54.5 acre tract and the J. M. Wood et ux 54.5 acre tract to stake at the Northeast corner of the J. M. Wood et ux 54.5.

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ASSIGNMENT OF PRODUCTION PAYMENT

TRICE PROD. CO.

TO

JOHN HOPKINS UNIVERSITY

FILED FOR RECORD

at 4:15 o'clock P.M.

FEB 27 1961

CALVIN H. BARBER

CLERK COUNTY COURT, RUSK COUNTY, TEXAS

By M. COX, Deputy

TRICE

Exhibit B

ASSIGNMENT

Pursuant to Decree of the United States District Court for the District of Maryland, entered December 10, 1968, in proceedings entitled "The Johns Hopkins University, Plaintiff, v. James M. Hutton, Jr., et al., Defendants", Civil Action No. 15098, and for good and valuable consideration, receipt of which is hereby acknowledged, The Johns Hopkins University (Assignor) does hereby assign, set-over and transfer to W. E. Hutton & Co. all of Assignor's right, title and interest in, to and under a certain letter from Trice Production Company, Cliff W. Trice, President, to Assignor, dated February 23, 1961, copy of which is attached hereto.

Assignor warrants that there have been no contracts or agreements executd by Assignor or affirmative acts by Assignor or its agents with respect to the undertakings embodied in said letter, except the following:

> Letter from William Patterson, Assistant Treasurer of The Johns Hopkins University, to Trice Production Company, attention Clyde Ford, dated August 6, 1962.
>
> [There shall be added to the Assignment before execution a list of acts subsequent to the date of the entry of the decree up to the date of the actual transfer.]

Upon written request of W. E. Hutton & Co., its successors or assigns, Assignor, its successors or assigns, will execute and deliver such further instruments and documents as W. E. Hutton & Co., its successors or assigns, may reasonably request in order to make this Assignment fully effective.

Exhibit B

This Assignment shall be effective from and after the date hereof.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed by its Vice President for Administration and its corporate seal to be affixed, duly attested, this day of , 196 .

THE JOHNS HOPKINS UNIVERSITY

By: .....
Vice President for Administration

ATTEST:

.....

[Corporate Seal]

STATE OF MARYLAND
CITY OF BALTIMORE

BEFORE ME personally appeared ,
of THE JOHNS HOPKINS UNIVERSITY, a corporation, and acknowledged the foregoing Assignment to be the act and deed of said THE JOHNS HOPKINS UNIVERSITY, and that he is duly authorized to execute the same.

GIVEN UNDER MY HAND AND OFFICIAL SEAL, this day of , 196 .

.....
Notary Public in and for
Baltimore City, Maryland.

Exhibit B

TRICE PRODUCTION COMPANY
P. O. BOX 1471
LONGVIEW, TEXAS
TELEPHONE PLAZA 3-3331

February 23, 1961

CLIFF W. TRICE
PRESIDENT

The Johns Hopkins University
Homewood
Baltimore 18, Maryland

Gentlemen:

The undersigned, Trice Production Company, has this day sold you a production payment and certain net profit overriding royalty interests out of certain oil and gas properties located in the States of Louisiana, Oklahoma and Texas under an Assignment of Production Payment and Net Profit Overriding Royalty Interests dated February 23, 1961, (hereinafter sometimes called the Assignment).

Such production payment, which is in the primary sum of $1,300,000.00, bears interest at the rate of six per cent (6%) per annum. As part of the consideration for your purchase of such production payment and net profit overriding royalty interests we have agreed and do now agree as follows:

(1) The undersigned guarantees that the amounts actually received by you under the terms of the Assignment will be sufficient to pay you six per cent (6%) per annum on the monthly unpaid balance of the

primary sum of $1,300,000.00 until Oilco Production Payment is liquidated and terminated and the undersigned agrees that in the event that in any month until the Oilco Production Payment is liquidated and terminated the amounts payable to you under the Assignment do not equal six per cent (6%) on the unpaid balance of the primary sum, then the undersigned will at once and without demand pay you each month the amount necessary to increase the amount receivable by you under such Assignments to six per cent (6%) per annum on the unpaid balance of the primary sum.

(2) The undersigned has warranted to you that under the laws of the State of Oklahoma as now in force you will not be required to pay the State of Oklahoma any income tax and in the event you are required to pay any income tax (or penalties or interest thereon) to the State of Oklahoma under the laws now in force, then the undersigned will pay to you the amount of such tax as it presently exists or may be hereinafter increased by legislative act; it is understood that this undertaking will not be applicable in the event that you are not taxable under the laws of the State of Oklahoma now in force and in particular will not be applicable in the event of an amendment to the laws of Oklahoma removing the exemption which we warrant you presently enjoy under Section 912 of Title 68 of the Oklahoma Statutes Annotated.

(3) The F. W. Dollar Well No. 1 in Rusk County, Texas, is now being worked over and the undersigned may find it necessary to drill a new well on the land described in Item (12) of Annex I to the Assignment or on a unit in which such land is included. In

Exhibit B

any event, unless the undersigned establishes production of oil or gas in commercial quantities from the land described in Item (12) of such Annex I (or other land unitized therewith) above 7275 feet from the surface on or before August 23, 1961, the undersigned will pay you the sum of $1,500.00, which shall be applied against the primary sum of $1,300,000.00, and you will in that event reconvey to the undersigned all of your right, title and interest in and to the land and lease described in Item (12) of such Annex I.

It is understood that this entire undertaking is in consideration of your purchase of the production payment and net profit overriding royalty interests and that you would not consummate such purchase unless the undersigned entered into the agreements contained in this letter.

Very truly yours,

TRICE PRODUCTION COMPANY
By /s/ Cliff W. Trice

President